United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1940.

No. 7734

685

SPECIAL CALENDAR.

WILLIAM D. PELLEY, APPELLANT

vs.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED JULY 31, 1940

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1940.

No. 7734

WILLIAM D. PELLEY, APPELLANT,

vs.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

INDEX.

United States Court of Appeals for the District of Columbia

A. District Court of the United States for the District of Columbia

Habeas Corpus No. 2067

In Re Habeas Corpus William D. Pelley

United States of America,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Petition for a Writ of Habeas Corpus*

Filed March 12 1940

In the District Court of the United States for the District of Columbia

Habeas Corpus No. 2067

In Re Habeas Corpus William D. Pelley

The petition of William D. Pelley, respectfully shows to this Honorable Court as follows:

1.

That your petitioner is a citizen of the United States, and brings this suit in his own right.

2.

That your petitioner has been placed under arrest and is now in the custody of John B. Colpoys, United States Marshal for the District of Columbia.

3.

That the said United States Marshal claims to be holding your petitioner as a fugitive from justice from the State of North Carolina, and is about to place your petitioner in the

custody of officers from the State of North Carolina for the purpose of taking him out of the jurisdiction of this Court to the State of North Carolina.

4.

That your petitioner is in the United States Marshal's custody as a result of a decision of a Justice of this Court, who after conducting an extradition hearing, in which your petitioner's return to the State of North Carolina was demanded, ordered your petitioner to be surrendered to the Marshal for the purpose of returning him to the State of North Carolina. Your petitioner asserts that the said order is in violation of his constitutional rights for the following reasons:

2 1. The requisition papers of the governor of North Carolina contain no statement whatsoever of any crime alleged to have been committed by your petitioner in the State of North Carolina.

2. The said requisition paper of the Governor of North Carolina merely sets forth that your petitioner was placed under a suspended sentence and the capias issued for his arrest without in any manner specifying any offense alleged to have been committed by your petitioner to justify the issuance of said capias.

3. The affidavits in support of the Governor's requisition show on their face that they are based upon "information and belief".

4. Your petitioner is not under indictment in the State of North Carolina, nor any other state or the United States.

5. Your petitioner is not charged with any crime against the laws of the State of North Carolina, nor any other State or the United States.

6. Your petitioner has not been charged with a crime within the meaning of the word crime as used in the Constitution of the United States.

7. The affidavits supporting the Governor's requisition do not disclose the source of information and belief set forth therein.

8. No prosecution has been inaugurated against your petitioner for any violation of law in the State of North Carolina, nor any other State or the United States.

9A. Your petitioner was placed under a suspended sentence of five (5) years by a State Court of North Carolina and the said five years expired February 17th, 1940,
3 and an extension of the said period of suspension beyond five years is expressly forbidden by the Code of Laws of the State of North Carolina. Notwithstanding the foregoing, your petitioner is informed and believes and therefore avers that Judge Nettles of Buncombe County illegally and arbitrarily passed an order on the 20th of February, 1940, extending the period of your petitioner's suspended sentence for another five years, after your petitioner had complied with all the terms of his suspended sentence and the five year term of suspension had expired on February 17, 1940.

9B. That at the time of the issuance of the capias herein, Judge Nettles at Buncombe County, North Carolina, delivered a long tirade of personal venom and animosity against your petitioner, which was published in the newspapers of general circulation throughout North Carolina and although the said tirade was issued in open Court and a stenographic copy of the said tirade is now in the Court records of the Court at Buncombe County, your petitioner has been denied a certified copy of the same and the said officers have refused to incorporate the said tirade in the Court records of this case because of the said Judge Nettles refusing to sign a technical order which would make the said stenographic record part of the proceedings. A copy of the said tirade is attached hereto and prayed to be read as part hereof.

10. The said requisition papers have been procured from the Governor not to prosecute your petitioner in good faith but to serve a private purpose in utter violation of the laws of the State of North Carolina and of the
4 United States and in utter defiance of the Constitution and laws of the United States.

11. Your petitioner is not a fugitive from the State of North Carolina.

12. The requisition papers are so hazy and inadequate that the defendant is not informed of any charge against which he might defend, violating the Sixth Amendment to the Constitution which provides:

"that any person shall be informed of the nature of the accusation against him".

13. The requisition papers are in utter violation of the Fourteenth Amendment to the Constitution in that the State of North Carolina is attempting to deprive him of his liberty without due process of law and also denying to him the equal protection of the laws as guaranteed to him by the Fourteenth Amendment.

14. The said requisition papers are in contemptuous disregard of the Fifth Amendment to the Constitution which provides:

"No person shall be deprived of life, liberty or property without due process of law"

which Amendment is in full force and effect in the District of Columbia.

15. The said requisition papers are in utter disregard of the Eighth Amendment to the Constitution inasmuch as the State of North Carolina, through its agents, is attempting to inflict "cruel and unusual punishment" upon your petitioner.

16. The said capias was issued capriciously, without any justification in law or fact.

17. Your petitioner was arrested while on the witness stand in the United States Capitol, where your petitioner was, in response to a subpoena issued, requiring his presence before a Committee of the Congress of the United States.

18. The said requisition violates your petitioner's Constitutional rights and infringes Section 2, Article 4, of the Constitution of the United States, which provides:

"That a person charged with treason, felony or any other crime, who shall flee from Justice"

and your petitioner is not charged with treason, felony, or any other crime and has not fled from justice.

19. Your petitioner is informed and believes and therefore avers, that the said five year period of suspension has been attempted to be enlarged by a Judge of the Court of North Carolina, which action is expressly forbidden by the Code of Laws for the State of North Carolina.

20. The said requisition is in violation of Section G, relating to "rules of practice of the Executive Department of North Carolina in making requisitions", which provides that:

"The application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever and that if the requisition applied for be granted, the Criminal proceeding shall not be used for any of said objects".

21. Your petitioner is informed and believes and therefore avers the fact to be, that if he is returned to the State of North Carolina, he is to be subjected to violent physical abuse and is to be detained at a prohibitive bond, and one which your petitioner will be unable to post. This averment is based in part upon the fact that when your petitioner was arrested in this cause, his bond was
6 fixed in the sum of Twenty-five Hundred ($2500.00) dollars, and when your petitioner indicated a willingness to post the said bond, the said bond was then arbitrarily and unconscionably increased to Ten Thousand ($10,000.00) dollars, which no local bondsman would post for your petitioner, causing your petitioner to be detained over a week-end in a local precinct jail. The said bond was then reduced, by a Police Court Judge, after a public hearing, to the sum of Twenty-five Hundred ($2500.00) dollars.

22. Petitioner further avers, that the sentence and suspension of sentence in Buncombe County, North Carolina, were illegal, unconstitutional, and in utter violation of petitioner's rights, in that petitioner was required to pay One Thousand ($1000.00) dollars fine on one count, and sentence on the other count, upon which petitioner was convicted, was without authority in law, and in total disregard of the Fifth Amendment to the Constitution of the United States, which provides that:

"No person may be twice placed in jeopardy of life or limb for the same offense"

for it is familiar learning, that a Court may suspend for judgement in toto, but has no power to impose two sentences for a single offense, as by pronouncing judgement

under one count in an indictment, and reserving the right to punish another count at a subsequent term.

23. My guilt of the accusation of not being of good behavior has been established without a hearing

Wherefore, the Premises Considered, Petitioner
7 Prays:

1. That a Writ of Habeas Corpus issue out of this Honorable Court directed to the said United States Marshal for the District of Columbia requiring him to produce the body of your petitioner forthwith before this Honorable Court.

2. That a hearing be had to determine the legality of this petitioner's detention and that pending said hearing your petitioner may be released upon giving sufficient security for his appearance before this Honorable Court.

3. That upon a final hearing your petitioner may be discharged from custody.

4. And for such other and further relief as the nature of the case may require and to the Court may seem proper.

WM D. PELLEY
Petitioner.

T. EDWARD O'CONNELL
Attorney for petitioner,
FRANKLIN V. ANDERSON
Attorney for petitioner

DISTRICT OF COLUMBIA: SS:

I, William D. Pelley, do solemnly swear that I have read the foregoing petition by me subscribed, and that I know the contents thereof; that the matters and things as therein stated upon personal knowledge are true and those stated upon information and belief, I believe to be true.

WM D PELLEY

SUBSCRIBED AND SWORN to before me this 12th day of March, 1940.

CHARLES E. STEWART
Clerk
By H B DERTZBAUGH
Asst Clerk

8 *Fiat*

Filed March 12 1940

* * *

Let the Writ issue before the Justice presiding in Motions Court No. .... at 1:30 P. M. March 20th, 1940; and, in the meantime, admit petitioner to bail, which is hereby fixed at Five thousand ($5,000.00).

March 12th, 1940.

F. DICKINSON LETTS
Justice

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9 *Writ of Habeas Corpus*

* * *

The President of the United States,

To John B. Colpoys, Greeting:

You are hereby commanded to have the body of William D. Pelley detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable F. Dickinson Letts one of the Justices of the District Court of the United States for the District of Columbia in the United States Courthouse, city of Washington (immediately), on the 12th day of March, 1940, at ....M., after the receipt of this writ, to do and receive whatever shall then and there be considered of in his behalf, and have then and there this writ.

Witness, The Honorable Chief Justice of said Court the 12th day of March, A. D. 1940

CHARLES E. STEWART,
(Seal) *Clerk.*

By J. WESLEY GARDNER JR,
Assistant Clerk.

Coroner's Return

Served the within-named John B. Colpoys, United States Marshal, by serving C. M. Kearney, Chief Deputy Marshal, personally with a true copy of the within writ of habeas corpus on the 12th day of March, 1940.

A MAGRUDER MacDONALD
Coroner, DC

10 Filed March 12 1940

Req. No. 781

North Carolina,
Buncombe County.

State

-vs-

W. D. Pelley

Application for Requisition

To His Excellency, the Honorable Clyde R. Hoey, Governor of the State of North Carolina:

The undersigned, Solicitor of the Nineteenth Judicial District, of the State of North Carolina, being the prosecuting Attorney of Buncombe County, State of North Carolina, hereby makes application for the extradition of W. D. Pelley and respectfully shows the followng facts, to-wit:

That this is an application for the requisition for the return to the State of North Carolina of one W. D. Pelley, charged and convicted in the County of Buncombe, State of North Carolina, on two counts of a bill of indictment, one count being for unlawfully, willfully and feloniously selling and causing to be sold securities and stocks without having first registered as a dealer and dealers or salesman and salesmen in the Office of the Corporation Commission of North Carolina, in violation of the statutes of the State of North Carolina; and count two for unlawfully, willfully knowingly and feloniously and for the purpose of selling securities and stocks in North Carolina, making false representations, in violation of the statutes of the State of North Carolina.

11 That the approximate time of the commission of said crime and crimes was on or about the first day of April, A. D. 1932, and that the place of the commission of said crime was the County of Buncombe, State of North Carolina, and that the said W. D. Pelley had for some time before and after the date aforesaid, sold and offered for sale, securities and stocks of Galahad Press, Inc., without having first registered as a dealer or salesman in

the Office of the Corporation Commission of North Carolina, in violation of the statutes of the said State of North Carolina, and before and after said date had fraudulently represented to the purchaser and purchasers and prospective purchaser and purchasers of securities and stock of Galahad Press, Inc., the amount of dividends, interest and earnings of said Galahad Press, Inc., knowing said representations to be false and in violation of the statutes of the State of North Carolina.

That this affiant is informed and believes that the said W. D. Pelley is in the District of Columbia, United States of America, at the time the application is made, and this affiant certifies that in his opinion the ends of justice require the arrest and return of the accused to this State for sentence and judgment upon conviction for the felony set forth in the Second Count in said Bill of Indictment, and for putting into effect the suspended sentence imposed on the First Count in said Bill of Indictment, and this proceeding is not instituted to enforce a private claim.

That this application for requisition is not made for the purpose of enforcing the collection of a debt or for any private purpose whatsoever, and if the requisition herein prayed for be granted the criminal proceeding shall not be used for any of said purposes.

12 That the said W. D. Pelley was convicted at the January A. D. 1935 Term of the Superior Court of Buncombe County, State of North Carolina, on each of the two counts of the bill of indictment hereinbefore referred to, and that at the request of said W. D. Pelley the matter was continued until the February A. D. 1935 Term of the Superior Court of Buncombe County, State of North Carolina, and at said February Term A. D. 1935, Honorable Wilson Warlick, Judge Presiding over the Superior Courts of the Nineteenth Judicial District, State of North Carolina, in which said Judicial District the said County of Buncombe is located, imposed a sentence on the First Count of said Bill of Indictment upon the said W. D. Pelley that he be confined in the State's Prison at Raleigh at hard labor for a period of not less than one nor more than two years, and suspended the foregoing sentence of imprisonment for a period of five years on the following conditions: (1) That the said defendant W.

D. Pelley pay a fine of $1,000.00 and the costs in the case; (2) That the defendant be and remain continuously of good behavvior; (3) That he not publish or distribute in the State of North Carolina, any periodical containing any statement relating to a stock sale transaction or report of a corporation as to its financial value for the purpose of effecting a sale of stock in said corporation without complying with the capital sales issue statute. On Count Two in said Bill of Indictment, which was the Count on which the said W. D. Pelley was convicted of fraudulent representations, prayer for judgement was continued for a period of five years with the consent and acquiescence of the said defendant W. D. Pelley.

13 That at said time and thereafter the said W. D. Pelley had executed and was under a bail bond in the sum of Twenty Five Hundred Dollars, the terms of which, among others, were that he "shall appear at the September Term 1934 of the Superior Court of Buncombe County, to be held at the County Courthouse in Asheville, North Carolina, on the 17th day of September, 1934, then and there to answer the charges preferred against him for Blue Sky Law, and to receive what shall by the Court be then and there enjoined upon him, and shall appear and attend at such time, and at all times thereafter as the Court may appoint upon any and all adjournments and continuances of said cause until the final disposition thereof, and shall not depart the court without leave."

That thereafter the defendant while within the State of North Carolina as this affiant is advised, informed and believes, committed various acts and engaged in conduct and practices which constituted a violation of his parole and probation and justified the imposition of judgement, including among others, acts, statements and conduct which tended to continue and further practice fraud and constitute false and fraudulent representations; acts and conduct in contempt of court; acts and conduct tending to create and induce and encourage breaches of the peace; acts and conduct inducing and encouraging the use of force against the constituted authorities in the United States; acts and conduct constituting Un-American Activities and propaganda and accepting pay and doing other acts and things constituting him an agent of foreign

government and foreign propaganda; and acts and conduct constituting false, malicious and libelous statements and publications against those in high authority, and
14 thereafter fled the State of North Carolina and became a fugitive from justice. That the Honorable Zeb V. Nettles, Judge Presiding over the Superior Court of Buncombe County, North Carolina, issued a capias on or about the 19th day of October, A. D. 1939 for the said W. D. Pelley to appear for judgment of conviction for a felony; and that in addition thereto, by reason of the acts and things herein mentioned and referred to, as well as various other acts and things, the said W. D. Pelley violated the terms of his bail, probation and parole; that said W.D. Pelley was present in the State of North Carolina at the time of the commission of the alleged crime and at the time of the violation of the terms of his bail, probation and parole and thereafter fled from Buncombe County and the State of North Carolina and has been a fugitive from justice from the State of North Carolina ever since at or about the time of the issuance of the said capias.

That attached hereto and accompanying this application are two certified copies of the indictment returned, verdict of the jury, judgment, capias and the Court record of the proceedings in said case; that this affiant believes he has sufficient evidence to secure the imposition of a sentence and the revocation of the parole and probate of the said defendant W. D. Pelley; that the person named as Agent is a proper person and has no private interest in the arrest of the fugitive.

That there has been no former application for a requisition of the same person.

That this affiant is Solicitor of the Nineteenth Judicial District of the State of North Carolina and as such is prosecuting officer of Buncombe County, State of North Carolina.

R. M. WELLS
Solicitor of the Nineteenth Judicial District, State of North Carolina.

15 STATE OF NORTH CAROLINA
County of Buncombe.

R. M. Wells, being first duly sworn, deposes and says:

That he is Solicitor of the Nineteenth Judicial District, State of North Carolina, and is empowered to make this verification; that he has read the foregoing affidavit and knows the contents thereof; that the same is true of his own knowledge except as to matters and things therein stated on information and belief, and as to those matters he believes it to be true.

R. M. WELLS
Affiant.

Sworn to and subscribed before me, this the 23 day of February, A. D. 1940.

EDWARD G ROBERTS
(Seal) *Deputy Clerk Superior Court of Buncombe County, N. C.*

16 Filed March 12 1940

Req. No. 781

Executive Department

(Seal of State)

State of North Carolina

To the Chief Justice of the District Court of the United States for the District of Columbia

The Annexed Papers, duly authenticated in accordance with law, show that by Application, Indictment, etc. in the County of Buncombe, State of North Carolina, W. D. Pelley stands charged with Judgment of Conviction for Felony & Imposition of Suspended Sentence—as set out in attached papers—which is a crime against the laws of this State; and it appearing that the said W. D. Pelley has fled from justice and has taken refuge in the District of Columbia

Therefore, in pursuance of justice, and by authority of the Constitution and laws of the United States, I, Clyde R. Hoey, Governor of the State of North Carolina, do hereby require that the said W. D. Pelley be apprehended and delivered to T. K. Brown, Deputy Sheriff, who is here-

by authorized and commissioned as the agent of this State to receive said fugitive and convey him to the County of Buncombe, in the State of North Carolina, to be dealt with according to law.

In Witness Whereof, I have hereunto set my hand and caused to be affixed the Great Seal of State.

17 Done at our City of Raleigh, this 8th day of March in the year of our Lord one thousand nine hundred and 40 and in the one hundred and 64th year of our American Independence.

(Seal) CLYDE R HOEY

By the Governor:

HATHAWAY CROSS
Private Secretary.

18 In the Superior Court
February Term (Criminal), 1935.

Judgment No. 13

NORTH CAROLINA,
BUNCOMBE COUNTY

STATE

VS.

WILLIAM DUDLEY PELLEY and ROBERT C. SUMMERVILLE,
Defendants.

For the purpose of judgment hereafter to be pronounced in the above entitled causes and the making of the record in the same, it appears that the trial of the matter above-entitled, consume thirteen (13) full days and went over for final determination into the fourteenth day,—the defendants, along with two other companion defendants, having been charged in the bill of indictment containing 16 counts, with certain violations under the statutes Nos. 2059, etc., being the Capital Issues Law of North Carolina, Chapter 149 Public Laws of 1927, and that at the conclusion of the evidence for the State, upon motion, thirteen of the original counts therein were dismissed and a verdict of Not Guilty entered. That thereupon three counts were submitted to

the jury, and in its verdict the jury returned a verdict of Not Guilty on another of the counts, leaving verdicts of guilty on two counts as against the two defendants Pelley and Summerville named above.

The judgment of the Court is as to both defendants, the judgment being individual, that the defendant Pelley be confined in State's Prison at Raleigh, at hard labor, for a period of not less than one, nor more than two years.

The Foregoing sentence of imprisonment is suspended for a period of five years, on the following condi-
19 tions:

1. That the defendant Pelley pay a fine of One Thousand ($1,000) Dollars and the costs of the case, which bill of cost has been approved by the Court as made up by the Clerk, and which, under the authority of the Court is to include the total amount ordinarily for which the bill is made up by the Clerk, together with the exact amount which Buncombe County has heretofore paid out for the expenses of the jury during the thirteen days and the expenses of the official court stenographer, it being the intent of the Court to reimburse fully the county for each amount expended by it.

2. That the defendant be and remain continuously of good behavior.

3. That he not publish and (or) distribute in the State of North Carolina any periodical which has to do with, or contains in it, any statement relating to a stock sale transaction or any report of any corporation as to its financial value, with the purpose of effecting a sale of stock in said corporation, without complying with the capital sales issue statute.

Judgment of the Court is, as to defendant Summerville, that he be confined in the State's prison at Raleigh at hard labor for a period of not less than one, nor more than two years. The foregoing judgment of imprisonment is suspended for a period of five years, on the following conditions:

1. That the defendant be and remain continuously of good behavior.

2. That he not publish and (or) distribute in the State of North Carolina any periodical which has to do with, or

contains in it, any statement relating to a stock sale transaction or any report of any corporation as to its financial value, with the purpose of effecting a sale of stock in said corporation without complying with the capital sales issue statute.

3. It appearing to the Court that the costs of the whole case having been assessed in the judgment heretofore entered against the defendant William Dudley Pelley, there is no cost adjudged against the defendant Summerville.

On count No. 2 against the defendants Pelley and Summerville, prayer for judgment continued for five (5) years.

(Signed) WILSON WARLICK,
Judge Presiding.

Monday, October 16, 1939

BE IT REMEMBERED, that a regular term of the Superior Court of Buncombe County, was opened and held for the trial of criminal and civil causes at the Court house in the City of Asheville, North Carolina, on the third Monday in October, 1939, the same being October 16, 1939.

Present, and presiding over said Court was Honorable Zeb V. Nettles under and by virtue of a Commission from the Executive Department of North Carolina, being in words and figures as follows:

"Executive Department

State of North Carolina

WHEREAS, the Hon. Z. V. Nettles, assigned by law to hold the Superior Courts of the 21st judicial district for the Fall term, 1939, and the Hon. J. A. Rousseau, assigned by law to hold the Superior Courts of the 19th Judicial District for said Fall Term, 1939, have agreed to exchange the courts of the particular counties hereinafter named in their respective districts for said Fall Term, 1939:

Now, Therefore, I, Clyde R.Hoey, Governor of the State of North Carolina, by virtue of authority vested in me by law, do hereby consent to said exchange, and to hereby authorize the said Hon. Z. V. Nettles to hold the said courts

of the counties of Buncombe, one week, beginning October 16th; Madison, One week, beginning October 23rd, in the 19th Judicial District, in lieu of the said Hon. J. A. Rousseau for said fall term, 1939; and the said Hon. J. A. Rousseau, is hereby authorized to hold the said Courts of the counties of Stokes, one week, beginning October 16th; Rockingham, one week, beginning October 23rd, in the 21st district, in lieu of said Hon. Z. V. Nettles, for said Fall term, 1939.

In witness whereof, I have hereunto set my hand and caused the great seal of State to be affixed, this the 9th day of October, in the year of our Lord one thousand nine hundred and 39, and in the one hundred and 64th year of our American Independence.

CLYDE R. HOEY

(Seal)

By the Governor:

Robert L. Thompson,
Private Secretary, T

Present, and prosecuting on behalf of the State, the Honorable R. M. Wells, Solicitor for the 19th judicial district of North Carolina.

The Grand Jury met in regular session with their foreman, Roy J. Davis, John Bennett acting as officer of said grand jury.

22 L. E. Brown, Sheriff of Buncombe County, returned into court the following venire, duly drawn and summoned to serve as jurors for this term:

I. Percy Justice and twenty-two others.

For good cause shown, the court excused the following: I. R. H. Cagle and nine others.

The oaths required were duly administered to the remainder of the venire and the court proceeds to transact the following business:

Thursday, October 19, 1939

The Court orders capias to issue, and defendant placed under $10,000.00 bond.

STATE

VS.

WILLIAM D. PELLEY, *Defendant.*

Friday, October 20, 1939

STATE

VS.

WILLIAM D. PELLEY, *Defendant.*

Order

Upon the request of No. R. M. Wells, Solicitor of the 19th judicial district, and with his consent, the Court hereby appoints Hon. R. R. Williams and Hon. T. J. Harkins, to represent the State and to present to the Judge of the Superior Court at a subsequent term all the facts, matters and things relating to the violations or violation of law with respect to the above named defendant; the Solicitor for the said district requesting the appointment for the reason that the said Solicitor was of counsel for the defendant in the original cause tried in this court and stating that it might cause him some embarrassment to present the facts to the court at this time.

This the 20th day of October, 1939.

ZEB V. NETTLES,
Judge Presiding

24 Buncombe County—In Superior Court.

STATE

Against

WILLIAM D. PELLEY

Capias

STATE OF NORTH CAROLINA:

To the Sheriff of Buncombe County—Greeting:

WE COMMAND YOU to take the body of William D. Pelley (if he be found in your county), and him safely keep so that you have him before the Judge of our Superior

Court, at a Court to be held for the County of Buncombe, at the Court House in Asheville, N. C., on the 1 Monday after 2 Monday in November 1939, then and there to answer the charge of the State against William D. Pelley on an indictment for Judgment upon conviction for felony.

Issued the 19 day of October, 1939.

J. E. SWAIN,
Clerk Superior Court, Buncombe County.
Per EDWARD G. ROBERTS,
Deputy Clerk.

25 Endorsed:

No. .....

STATE
vs.
WILLIAM D. PELLEY

Capias

To November Term, 1939
Fee . . . . . $.....
Mileage . . . . . $.....
Received October 19, 1939.

Due search made and the defendant not to be found in Buncombe County or the State of North Carolina.

L. E. BROWN
Sheriff Buncombe County.
By C. M. GILBERT, *Deputy*

26 In the Superior Court

February A. D. 1940 Term.

NORTH CAROLINA,
Buncombe County.

STATE
vs.
W. D. PELLEY, ET AL.

Order

The undersigned Judge of the superior Court finding as a fact that at the February A. D. 1935 term of the super-

ior court of Buncombe County, State of North Carolina, the defendant W. D. Pelley was sentenced to be confined in the State's Prison, at Raleigh, at hard labor, for a period of not less than one nor more than two years, and the said sentence of imprisonment was suspended for a period of five years on certain conditions, the said sentence having been entered and suspension made on one count of a bill of indictment on which the said W. D. Pelley was convicted; and the court also finding as a fact that on another count of said bill of indictment prayer for judgment was continued at said February A. D. 1935 term of the superior court against the said defendant W. D. Pelley for five years; and the court further finding as a fact that at the October A. D. 1939 term of the superior court of Buncombe County, State of North Carolina, the undersigned Judge issued a capias for the arrest of the said W. D. Pelley to be brought before the court for the purpose of imposing sentence upon the said W. D. Pelley within the said period of five years, and also for the purpose of determining whether his suspended sentence should be put in effect; and the court further finding as a fact that diligent and earnest efforts have been made by the Sheriff of Buncombe County and the law enforcement officers throughout the State of North Carolina and other States of the
27 United States of America to find the said W. D. Pelley, and that notices for the arrest of the said W. D. Pelley have been sent to the law enforcement officers of many States of the United States of America; and the court further finding as a fact that the said W. D. Pelley cannot be found within the State of North Carolina and has been and now is a fugitive from justice outside of the jurisdiction of North Carolina and is now resisting extradition to this State, and that because of the flight of the said W. D. Pelley from the State of North Carolina and his becoming a fugitive from justice and concealing himself from officers, and his resisting extradition to this State, all for the purpose of avoiding the capias heretofore issued, this court cannot now bring the said W. D. Pelley before it; and the court further finding that the ends of justice require that suspension of the sentence hereinbefore mentioned be continued for a period of five years longer from this date, and also that the prayer for judg-

ment on the other count in said bill of indictment against the said W. D. Pelley be continued for a period of five years from this date, and that alias capias issue from time to time until defendant shall be apprehended and brought before this court;

It is therefore ordered and adjudged that the suspension of sentence of said W. D. Pelley hereinbefore mentioned be continued for a period of five years; and also that the prayer for judgment on said W. D. Pelley hereinbefore mentioned be continued for a period of five years; and that at any term of court during said period of five years, judgment may be imposed on said W. D. Pelley, or suspended sentence may be put in effect, or both.

ZEB V. NETTLES,
Judge presiding over the Superior Courts of the Nineteenth Judicial District, State of North Carolina.

28 In the Superior Court

STATE OF NORTH CAROLINA
County of Buncombe

I, J. E. Swain, Clerk of the Superior Court of Buncombe County, State of North Carolina, do hereby certify that the foregoing is a true and perfect copy of the record in the case of State vs. William Dudley Pelley, et al, as appears of record and on file in this office. In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this the 7th day of March, 1940.

(SEAL)

J. E. SWAIN
Clerk of the Superior Court of Buncombe County, State of North Carolina.

29 Superior Court

Nineteenth Judicial District

STATE OF NORTH CAROLINA
County of Buncombe

I, Wilson Warlick Judge of the Superior Courts of the State of North Carolina, holding the Superior Courts of

the Nineteenth Judicial District in said State, and being now the sole presiding Judge of the Superior Court of the County of Buncombe, which County is included in said district, do hereby certify that the said court is a court of record, having a seal; that the papers, books and records of said Court are kept in the Office of the Clerk of said Court and the Clerk of said Court is the keeper of the same; that J. E. Swain whose name is signed to the foregoing certificate is now and at the time of signing the same, was Clerk of said Superior Court of Buncombe County, duly elected, qualified and acting and duly authorized and the proper person to make said certificate; that the seal affixed to the foregoing certificate of said J. E. Swain, Clerk, is the seal of said Court; that I am well acquainted with the handwriting of said J. E. Swain, and that the signature attached to the foregoing certificate is the genuine signature of J. E. Swain, and the official acts and doings of said Clerk are entitled to full faith and credit and that the said attestation and certificate are in due form of law.

Given under my hand, this the 7th day of March, A. D. 1940.

WILSON WARLICK
Judge, Superior Courts of North Carolina, holding the Superior Courts of the Nineteenth Judicial District, and being now the sole presiding Judge of the Superior Courts of Buncombe County, North Carolina.

30 Superior Court

Nineteenth Judicial District

STATE OF NORTH CAROLINA
County of Buncombe

I, J. E. Swain, Clerk of the Superior Court of the County of Buncombe, in the State of North Carolina, do hereby certify that the Honorable Wilson Warlick whose name is signed to the above and foregoing certificate is now and

at the time he signed the same was Judge of the Superior Courts of North Carolina, holding the Superior Courts of the Nineteenth Judicial District, and he was then and is now the sole presiding Judge of the Superior Court of Buncombe County, N. C., which county is included in said district, duly elected, commissioned, qualified and acting; that I am well acquainted with the handwriting of said Wilson Warlick; and that the signature attached to the foregoing certificate is the genuine signature of said Wilson Warlick; that the official acts and doings of said Judge are entitled to full faith and credit and that his said attestation and certificate are in due form of law.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at my office in the City of Asheville, N. C., this the 7th day of March, A. D. 1940.

(SEAL)

J. E. SWAIN

Clerk Superior Court
Buncombe County, North Carolina.

31 *Order For Warrant of Arrest Upon Requisition.*

Filed March 12, 1940

In The U. S. District Court of The

District of Columbia, At Chambers,

the 12th day of March, 1940

No. 781 Requisition Docket.

IN RE, THE STATE OF NORTH CAROLINA

vs.

W. D. PELLEY

The Governor of the State of North Carolina having made Requisition upon the Chief Justice of said Court, dated the 8th day of March, 1940, for the delivery to T. K. Brown, Agent of said State, of W. D. Pelley, a fugitive from justice, charged in the County of Buncombe, in said State, with the crime of Judgment on conviction for felony

and Imposition of suspended sentence, it is hereby ordered that a warrant be issued to the United States Marshal for the District of Columbia, commanding him to apprehend and bring the said fugitive before me forthwith (on the 12th day of March, 1940), to be dealt with according to law.

ALFRED A. WHEAT
Chief Justice.

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32 *Return and Answer*

Filed March 18, 1940

* * *

Comes now John B. Colpoys, United States Marshal in and for the District of Columbia, and for his return to the writ of habeas corpus issued herein and for his answer to the petition filed herein says as follows:

1. He is without knowledge as to the allegations of paragraph one of said petition.

2. He admits the allegations of paragraph two of said petition.

3. He admits the allegations of paragraph three of said petition.

4. In answer to paragraph four of said petition, this respondent denies that said order of surrender is in violation of the constitutional rights of the petitioner.

In answer to sub-pargraphs 1 through 23, inclusive, of paragraph four of said petition, your respondent denies the allegations of each and every sub-paragraph, and avers the facts to be as follows: The petitioner herein was remanded to the custody of the respondent by oral order of the Chief Justice of this Honorable Court after a hearing on the requisition of the Governor of the State of North Carolina, which requisition papers are attached hereto and made a part hereof by reference, the same being Requisition No. 781. This respondent is informed and believes and therefore avers the facts to be as set out in said papers. Answering further, your respondent says that the Chief Justice, after the hearing on said requisition, found the petitioner to be substantially charged with crime in the State of North Carolina and to be a fugitive from justice of the

State of North Carolina in accordance with the relevant provisions of the Constitution and Statutes of the
33 United States enacted pursuant thereto, and thereupon issued an order surrendering petitioner to the agent of the State of North Carolina. A copy of the said order of surrender it attached hereto and made a part hereof. Pending the application for the writ of habeas corpus herein petitioner was remanded to the custody of this respondent.

Wherefore, the premises considered, your respondent prays that the writ of habeas corpus heretofore issued herein be discharged, the petition dismissed, and the petitioner remanded to his custody for surrender to the agent of the State of North Carolina.

JOHN B. COLPOYS,
United States Marshal in and for the District of Columbia.

DAVID A. PINE
United States Attorney.

JOHN J. WILSON
Assistant United States Attorney.

JOHN C. CONLIFF, Jr.
Special Assistant to the United States Attorney.

District of Columbia, ss:

I, John B. Colpoys, being first duly sworn, on oath depose and say: That I am United States Marshal in and for the District of Columbia, that I have read the foregoing return and answer by me subscribed and know the contents thereof and the matter and things therein stated I verily believe to be true.

JOHN B. COLPOYS.

Subscribed and sworn to before me this 18″ day of March, 1940.

LILLIAN A. TRAMMELL
(SEAL) *Notary Public. D. C.*

34 *Notice To Take Depositions*

Filed March 18, 1940

* * *

To: JOHN H. WILSON, Esq.,
and
JOHN CONLIFF, Esq.,
Attorneys for respondent.

Gentlemen:

Please take notice that on Tuesday, March 26, 1940, at 11:00 A. M., at Suite 410, Medical Building, Market Street, Asheville, North Carolina, depositions will be taken in the above entitled cause, of the following named persons, before Miss Marie Shank, Notary Public, at the aforementioned address:

Judge Zeb V. Nettles, Cuncombe County Courthouse, Asheville, N. C.

Robert M. Welles, Esq., Public Utilities Building, Asheville, N. C.

J. Y. Jordan, Esq., Pack Square, Asheville, N. C.

Clerk of the Court of Buncombe County, Asheville, N. C.

Attorney Robert R. Williams, Pack Square, Asheville, N. C.

Attorney T. J. Harkins, Pack Square, Asheville, N. C.

Attorney Joseph Ford, Suite 410, Medical Building, Market Street, Asheville, N. C.

Also please take notice that on Saturday, March 23, 1940, at 2:00 P. M., in my office, 424 5th Street, N. W., Washington, D. C., I will proceed to take the deposition, in the above entitled cause, of the following named person, before H. A. Harkins, a Notary Public, in and for the District of Columbia:

Robert H. McNeil, 1627 K Street, N. W., Washington, D. C.

T. EDWARD O'CONNELL
Attorney for petitioner.

35 *Marshal's Returns On Subpoenas Issued*

March 19, 1940

Summoned the above-named witness Robert M. Welles, J. Y. Jordan, Clerk of Court of Buncombe Co., served on J. E. Swain, clerk all of Asheville, N. C., on March 22, 1940.

Judge Zeb V. Nettles,

at Asheville, N. C.

on Mar. 23, 1940.

CHAS. R. PRICE,
U. S. Marshal,

By JOHN W. EDWARDS,
Deputy.

Summoned the above-named witness Robt. R. Williams, T. J. Harkins and Joseph Ford, all of Asheville, N. C. on March 22, 1940.

CHARLES R. PRICE
U. S. Marshal,

By JOHN W. EDWARDS,
Deputy.

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36 *Marshal's Returns*

(To subpoena issued March 25, 1940, to Clyde R. Hoey)
Summoned the above-named witness Clyde R. Hoey, personally, March 25, 1940.

JOHN B. COLPOYS,
U. S. Marshal,

By J. A. QUINN,
Deputy.

L

(To subpoena issued April 4, 1940, to Martin Dies, Robert Barker and Samuel Dickstein)

1) Martin Dies, personally, April 4, 1940.
2) Robert Barker, personally, April 4, 1940.
3) Samuel Dickstein, Not to be found, April 5, 1940.

JOHN B. COLPOYS,
U. S. Marshal in and for the D. of C.
By 1) T. F. QUINN—
2 & 3) T. J. KELLEY.
Deputy U. S. Marshals.
L.

(To subpoena issued April 5, 1940, to Hon. John P. McMahon and Carl Kindleberger)

Summoned the above-named witness Hon. John P. McMahon, personally, April 5, 1940. Carl Kindleberger, personally, April 5, 1940.

JOHN B. COLPOYS,
U. S. Marshal,
By A. P. HARE,
Deputy.
L.

Memorandum

April 1, 1940.
Bond ($250) of petitioner on appeal—filed.

37 *Order*

Filed July 3, 1940

* * *

On motion of the petitioner and for good cause shown, it is, by the Court, this 3rd day of July, 1940,

ORDERED,

That the Clerk of this Court send to the Court of Appeals, as part of the record in the above-captioned case, the originals of depositions and exhibits designated by petitioner.

DANIEL W. O'DONOGHUE
Justice

38 *Transcript of Proceedings*

Filed July 8, 1940

In The District Court of The United States
For The District of Columbia

Application for Requisition

Requisition No. 781.

NORTH CAROLINA,
Buncombe County.

STATE

vs.

W. D. PELLEY

Washington, D. C.

Tuesday, March 12, 1940.

The above-entitled case came on for hearing before Chief Justice Alfred A. Wheat at 11:30 o'clock a. m.

Appearances:

On behalf of the United States:

John J. Wilson,
Assistant United States Attorney.
John C. Conliff, Jr.,
Assistant United States Attorney.

On behalf of the State of North Carolina:

R. R. Williams,
T. J. Harkins.

On behalf of the Defendant:

T. Edward O'Connell.

Proceedings

Mr. Wilson. May it please the court, before proceeding may I introduce to your Honor Mr. T. J. Harkins and

Mr. R. R. Williams, from Asheville, North Carolina.

39 The Court. I am glad to meet you gentlemen.

Mr. Wilson. They are members of the bar of North Carolina and are consulting with us in this matter.

The Court. While I have been waiting I have been glancing at these papers, and I had not yet got to the requisition. It is the last paper in the bunch.

(After reading papers) You may proceed.

Opening Statement on Behalf of the United States

Mr. Conliff. If your Honor please, the defendant, William Dudley Pelley, was convicted in North Carolina on January 22, 1935, on two counts of a 16-count indictment. The first count under which he was convicted charged a violation of the State Blue Sky law. The second count consisted of his violation of the State statute with respect to making false representations with respect to the sale of securities. Both of these counts, incidentally, I might add, are felony counts.

On February 18, 1935, the defendant was sentenced on the first count to a period of from one to two years imprisonment, and the sentence was suspended for a period of five years on certain conditions.

On the second count on which he was convicted, namely, the count charging him with false representations with respect to the sale of securities in the state, the court continued the prayer for judgment for a period of five years. In other words, sentence was not imposed at that time, and the term was extended for a period of five years.

The Governor, in his extradition papers, charges that the defendant is guilty of a crime and that he is

40 wanted by the State now, first, for the purpose of imposing sentence under the second count and, secondly, for the purpose of determining whether the suspended sentence on the first count should be put into effect.

The Court. Was he tried on the second count?

Mr. Conliff. He was tried on both counts. The trial took approximately 13 days.

The Court. And convicted?

Mr. Conliff. And convicted. But on one count he received a suspended sentence, and on the other count the prayer for judgment, as they call it—that is, the imposition of sentence—was suspended for a period of five years.

This proceeding is in accordance with the procedure in the State courts of North Carolina; and there are ample citations, including decisions of the Supreme Court of the State of North Carolina.

If your Honor please, I can submit evidence as to whether or not the defendant is the same man named in these papers and, of course, whether or not he is the same man who was convicted in the State of North Carolina—

Mr. O'Connell. If your Honor please, on behalf of the defendant I say that he is the person to whom Mr. Conliff has referred.

The Court. As you gentlemen both know, the question before me is limited to the identity of the man, the regularity of the papers, and the question of whether or not he is a fugitive.

Mr. Conliff. We have eliminated the question of whether or not he is the same man named in the papers, and
41 whether or not he is a fugitive. So that leaves the question of whether or not the papers are in order and whether or not he is substantially charged with a crime.

The Government submits that the papers are in order; that the record of the State of North Carolina, as certified in the indictment, the court minutes, the judgment of the court, and the capias, are in proper form and duly authenticated; secondly, the Governor has certified that this is a crime under the laws of North Carolina, and therefore we submit that he is subject to extradition.

Opening Statement on behalf of the Defendant

Mr. O'Connell. If your Honor please, on behalf of Pelley, I would like to correct the statement made by Mr. Conliff that the sentence was suspended on the first count on which he was convicted. He was convicted on two counts. Pelley paid a fine of $1,000 on the first count. The imposition of sentence on the second count was suspended for five years, and there were two conditions attached to that suspension. One was that he not engage in the publication of certain pamphlets relating to a stock transaction. That is not in question in this case.

He is charged with having violated the second condition of the suspension; that is, that he be of good behavior.

I would like to call your Honor's attention to the fact that the phrase "be of good behavior" is a rather vague and indefinite term. We must, in looking at the papers in this case, be not guided, strictly speaking, by the law of the District of Columbia, but in an effort to give effect to these papers we must construe them under the laws of North Carolina.

The Supreme Court of the State of North Caro-
42 lina has said in another case, the case of State against Hardin, that where sentence is imposed upon any defendant and the condition attached to it is that he be of good behavior before any Judge may remove that suspension and impose sentence, the defendant must be charged with a substantial crime.

The Court. Say that again, please. I did not quite follow you.

Mr. O'Connell. The term "good behavior," according to a construction placed on it by the Supreme Court of North Carolina, presupposes behavior authorized by law as contrary to behavior violative of the law. That is the definition of it by the State of North Carolina in the case of State against Hardin, which is a leading case on the subject. The court said that the court had jurisdiction only of the laws of the State of North Carolina, and that before sentence can be imposed, where it has been previously suspended, there must be a showing that the defendant has done something offensive, that is not considered to be good behavior. The Supreme Court of North Carolina has said that you must charge that man with a violation of the law of the State of North Carolina before he can be brought in and suspension lifted or sentence imposed.

I think that will be conceded by Mr. Conliff to be the law, and by Mr. Wilson. If it is not, I shall be glad to bring citations to your Honor.

There is an additional question here. Mr. Conliff has said that of course the man is a fugitive. To be a fugitive a man must be charged with a crime and he must be wanted for a legal, authorized good-faith prosecution in the state that seeks him.

43 I say to Mr. Conliff and to your Honor—or, rather, I will say to your Honor and Mr. Conliff—

The Court. You need not be fussy about that.

Mr. O'Connell. I saw a very eminent member of the bar walk into an unfortunate situation when he was taking the testimony of a man who was in the hospital with a policeman attending him. The defendant's lawyer said, "What went on in that only the attorney, the defendant, the policeman, and God will ever know."

The district attorney said, "At least it would have been more decent to put the Lord first."

We further attack these proceedings on the ground that a court—and I think your Honor will agree that this is substantially the law—can suspend a sentence in toto, in its entirely, but it cannot suspend on one count and impose sentence on another in the same indictment, because to permit such a procedure would result in this situation, that if a man were charged with violating the criminal laws on two counts, a Judge could bring him in and say, "I will sentence you to pay a fine of $5,000 on the first count. I will suspend sentence on the second count and place you on probation,"—as is often done down in Buncombe County—very well named—and then after the man has paid the $5,000, after four years and eleven months have elapsed, the Judge may say he is not of good behavior, and say "I don't like what he is doing." Good behavior really amounts to a conclusion; it is so indefinite in its terms. Maybe the man likes to ice-skate, and the Judge had a terrible fall on one occasion, and he thinks that anybody that does
44 ice-skating is not behaving himself, that it is a sport that is going to result in injuries. The Judge might say, "He might break his leg. I will put him in jail for the protection of the public." And then at the end of five years, impose another sentence after the man had paid $5,000 on one count in the same indictment.

Or the court could do this. It could say, on that first count, "Mr. Defendant, I will sentence you to five years in the penitentiary, on one count, and on the other I will suspend sentence for ten years."

Incidentally, they have attempted to suspend sentence in this case for ten years. I think the record will show that.

The Court. I thought it was five years.

Mr. O'Connell. I think your Honor will be shocked when I bring those matters in this proceeding to your attention.

Going along with the situation which I have just stated to your Honor, the defendant might serve five years on one

count, and the sentence under the second count might be suspended for ten years. Nine years later the Judge could say, "You have not been of good behavior, and I will sentence you to five years more on the second count."

That is a possibility and a logical inference to be drawn from the charges in this case.

I would like to have your Honor keep in mind the fact that Pelley—and Mr. Conliff will back me up in this—was sentenced on February 18, 1935, the five years expiring February 18 of this year. The North Carolina Code specifically states that no sentence may be suspended for a period longer than five years. That is the limit. It cannot be continued, extended, postponed, or anything done in connection with it, because that Code specifically states in no uncertain terms that five years shall be the limit of a suspension of sentence. Nevertheless the very learned Judge of Buncombe County, North Carolina, on February 20 of this year—and I believe a certified copy of what I am about to comment on is in the papers—signed an order. The first five years had expired, but he extended the term for another five years—one of the most shocking things that I believe has been called to your Honor's Attention relative to judicial procedure for a long time. It was extended for another five years, despite the specific provision in the North Carolina Code that he cannot do that. Nevertheless the Judge is attempting to do it.

At this time, to simplify things, I would like to ask whether or not it is desired to bring Mr. Pelley back to North Carolina for the purpose of holding an inquiry to decide whether or not he has been of good behavior. Is that the contention, Mr. Conliff?

Mr. Conliff. If your Honor please, I do not think we can inquire as to what the intent of the court in North Carolina is. The man was convicted in the State of North Carolina. Sentence was not imposed on the second count. The court has the right to impose sentence, as the decisions of the Supreme Court of North Carolina bear me out, at any time within that period. I do not think it is proper in an extradition proceeding to go back of what is contained in the papers as to what the court intends to do. There is no question that the court has the right to sentence this man. On the second count he has never been sentenced. No one

can question the fact that the court has a right to
46 sentence a man after he has been convicted.

On the first count, where the sentence was suspended, the court has seen fit to issue a capias for the return of this man; and whether or not the court will see fit to put the suspended sentence into effect, or whether or not it will see fit to discharge him or continue him on probation is a matter for the court alone to determine, and no other tribunal has a right to go into that.

Mr. O'Connell. Ordinarily what Mr. Conliff says is the truth; but I would like to call to Mr. Conliff's attention the case of the State v. Smith, 146 Southeastern, 73, in which the Supreme Court of North Carolina said:

"The entering of a judgment lifting a suspension of sentence and imposing sentence entered without hearing and without evidence of the finding of a violation of a condition originally imposed, held unauthorized."

And in that case they cite the case of State v. Hardin, State v. Phillips, and State v. Gooding, and go on to say that the defendant must have an opportunity to be heard in open court as to whether suspended sentence had been complied with, and it must be proved by evidence that the conditions have been violated.

Having in mind what I have just said to your Honor, that the defendant is entitled to a hearing in open court, I want to quote from the latest order entered with reference to the conditions and circumstances in this case. I would like to read you three lines from the order of the Judge, keeping in mind that the Supreme Court of the
State of North Carolina says that a man must be
47 given a hearing, and it must be shown that he violated the law of the State before suspension can be lifted and the sentence imposed. I think it is the most outrageous thing. I do not know how they put this in the order, because it is nothing but a scheme and a frame-up, indicating the ulterior motives behind the prosecution.

It says that the court further finds as a fact that at the October term, A. D. 1939, of the Superior Court of Buncombe County, North Carolina, the Judge issued a capias for the arrest of the said W. D. Pelley.

Just keep in mind what the purpose of the capias is; and these are the Judge's own words:

"To be brought before the court for the purpose of imposing sentence."

Not for a hearing; not to give this man an opportunity to say, "Confront me with evidence, under the Constitution. I am entitled to hear my accusers and to offer some evidence in rebuttal, if any I have. Under the Constitution I am entitled to be confronted by my accusers, to know whereof I am accused and of what I am accused."

Nowhere in these proceedings have they said anything to your Honor to the effect that this man has been a bad citizen and has done anything to violate the laws of the State of North Carolina. They are trying to hang their hat on the old parole citations where a convict is paroled pending good behavior, and during the term of his parole he violates it. Parole does not justify extradition. That is not the situation here. This man is not on parole.

I do not know whether Mr. Conliff will object to it, but your Honor is not bound in this proceeding by strict
48 rules of law. There was a sentence suspended in North Carolina, and that can only be lifted by having the man charged with a violation of a substantial criminal law of the State of North Carolina.

The Court. That may be true of the first count; but as to the second, what about that?

Mr. O'Connell. The second one is the one with which we are concerned. On the first count he paid a $1,000 fine. On the second one sentence was suspended for five years—

Mr. Conliff. I would like to object to that, if your Honor please. The exact judgment is contained in the requisition papers, and there is no question about the first count. Certain conditions were attached to it, and the words in the judgment are as follows:

"Count No. 2 against the defendant Pelley and prayer for judgment continued for five years."

There is no condition attached to that whatsoever. The sentence is merely continued for a period of five years.

Mr. O'Connell. I will give your Honor a copy of the order. Will your Honor permit me to show you in the papers?

The Court. Yes.

Mr. O'Connell. I do not see how Mr. Conliff could have made the statement which he just made to your Honor. Here is the language of the court in this paper which is signed by the Governor (indicating). "The foregoing sentence of inprisonment is suspended for a period of five years on the following conditions."

This (indicating) is a certified copy of the court's order—

49 Mr. Conliff. I think Mr. O'Connell should read from the beginning.

The Court. I cannot understand you when you are both talking at once.

Mr. Conliff. Mr. O'Connell started half way in the judgment.

Mr. O'Connell. I will read it all:

"1. That the defendant Pelley pay a fine of $1,000 and the costs of the case," and so forth.

"2. That the defendant be and remain continuously of good behavior."

That is the provision on which they are attempting to bring him in. Now, that provision relates to both counts, because when they sentenced him there were two defendants convicted. One was Pelley and the other was Summerville. The court first takes up the case of Pelley and forces him to pay a fine of $1,000, and then goes on to say that it will suspend sentence, not on the other count, but it is obvious what the court's intent was, because it could not fine him $1,000 and suspend sentence at the same time. That would be doing what I called to your Honor's attention a little while ago. That provision applied to both of these counts.

I am not going to make a great point of that. But, regardless of what Mr. Conliff says, we are concerned with the expression that he "be of good behavior."

The Supreme Court of the State of North Carolina has said many times over that you cannot sentence a man on a suspended judgment without his being present and being given an opportunity to be heard.

50 The Court. Is not that what they want to get him back for?

Mr. O'Connell. No, indeed. They have already sentenced him; they have already decided that he is guilty.

Mr. Conliff. I do not like to interrupt, but with respect to the judgment of this court I think it should be made clear to your Honor exactly what this sentence was on each individual count. Mr. O'Connell did not start at the beginning of the sentence. He started to read, implying that those conditions attached to the second count.

Mr. O'Connell. Read the whole thing.

The Court. Let me read it.

(Papers were handed to the court.)

Mr. Wilson. I call your Honor's attention to the last paragraph.

The Court (reading): "On count No. 2 against the defendants Pelley and Summerville, prayer for judgment continued for five years."

I think I have read it correctly.

Mr. O'Connell. I do not want unduly to prolong this case, but for the purpose of showing your Honor what the real situation is I would like to call Mr. Williams to the stand.

The Court. Is he one of the gentlemen who was introduced to the court this morning?

Mr. Williams. I am a lawyer from North Carolina.

Mr. Williams. I am a lawyer from North Carolina.

51 Thereupon **Robert R. Williams** was called as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Connell:

Q. What is your full name, sir? A. Robert Ransome Williams.

Q. What is your occupation or profession? A. I am a lawyer.

Q. Where? A. In North Carolina.

Q. What county? A. Buncombe County.

Q. You know the defendant Pelley, do you not? A. Yes.

Q. You are very well acquainted with the Judge who signed the capias for Mr. Pelley, are you not? A. Yes.

The Court. Are you an officer there, a district attorney or prosecuting officer?

The Witness. I am in this situation, your Honor. The prosecuting attorney now was Mr. Pelley's attorney at the trial of this case. In view of that situation the Judge appointed Mr. Harkins and me special prosecutors in this case to represent the People of the State.

The Court. The man who prosecuted Pelley is now Pelley's counsel?

The Witness. No, sir. The man who was Pelley's
52 counsel at the time of the trial is now the prosecuting attorney.

By Mr. O'Connell:

Q. Who was the prosecutor of Pelley? A. The prosecuting attorney at the time has since been elected Judge.

Q. The man who prosecuted Pelley is the Judge who is issuing this capias for his arrest? A. I say that; but I wish to add an explanation. He has expressly stated—

Mr. O'Connell. I object to what he has expressly stated.

The Court. What did you put this man on the stand for? You said you wanted to put him on the stand for the purpose of showing conditions down there.

Mr. O'Connell. Yes, sir—this condition that he has just stated, that the man who prosecuted Pelley is now the Judge, and he is the one who issues these papers to bring Pelley back—still prosecuting him.

The Witness. I want to explain that the Judge has said that he would not hear this case. We have a rotation system of Judges in North Carolina; and the Judge who is on the bench and will hear this case is the Judge who presided at the trial at the time Pelley was convicted, who knows all the facts, and who, Mr. Pelley in a public statement said, had given him a perfectly fair and impartial trial.

Mr. O'Connell. Is there a copy of the order of February 20 in these papers?

Mr. Wilson. Of this year?

Mr. O'Connell. Yes.

Mr. Wilson. I think so.

53 The Court. I think it is dated February 20.

By Mr. O'Connell:

Q. How long have you been practicing law in North Carolina A. Thirty-six years, almost.

Q. It is judicial procedure there, is it not, to bring a man in and give him a hearing before a suspension is lifted and sentence is imposed? A. Oh, yes.

Q. I will ask you to read this. This is a copy of the order signed February 20. Will you read, starting after the semi-colon there (indicating)? A. This speaks for itself.

Q. I will ask you to read it to his Honor.

The Court. Is that what I read a little while ago

Mr. O'Connell. No, sir.

The Court. Go ahead and read it, then.

The Witness. Shall I read the entire order?

Mr. O'Connell. I have a purpose in asking you to start with the semi-colon, where I pointed out.

The Witness (reading): "And the court further finding as a fact that in the October A. D. 1939 term the undersigned issued a capias for said W. D. Pelley to be brought before the court for the purpose of imposing sentence upon the said W. D. Pelley within the said period of five years, and also for the purpose of determining whether his suspended sentence should be put into effect."

Mr. O'Connell. I want to emphasize to your Honor that this order says that they want him back there not to
54 give him a hearing, but to impose sentence on him.

The Court. And the chances are that when he is brought back there he will be heard.

Mr. Conliff. He cannot have a hearing until he is present before the court.

The Court. This is but a paper upon which he is brought before the court. When he is brought before the court, then he has certain rights.

Mr. O'Connell. Will your Honor keep in mind that this man's suspended sentence expired February 17, 1940.

By Mr. O'Connell:

Q. When did the February term start? A. It started—I forgot the exact date; but if a capias had been issued in October of last year and he had fled the State, it is our interpretation of the law that a man cannot flee the jurisdiction of a state and hide himself and let the time run out and take advantage of the expiration of the time.

By Mr. O'Connell:

Q. In other words, you state that the issuance of the capias stopped the period of the five years running? A. Yes.

Q. Explain why the Judge extended the five years by his written order. A. That was done just as a precaution.

Q. And you knew that this order was entered after the first five years had expired, did you not? A. At the same term of court—

Q. Will you answer that question? A. No; I don't know that.

55 Mr. Wilson. If you want to argue with the witness, you can expect to get that kind of an answer.

Mr. O'Connell. I expect to get that kind of answer, all right.

The Court. Mr. O'Connell, you have got to be courteous.

Mr. O'Connell. I will apologize for that, your Honor. I merely said that in view of what Mr. Wilson said.

That is all, sir.

(The witness left the stand.)

Mr. O'Connell. May we approach the bench, your Honor?

The Court. Yes.

(Counsel for both sides approached the bench and conferred with the court in a low tone of voice as follows:)

Mr. O'Connell. If your Honor feels that he should be returned to North Carolina I do not want to prolong this case. Will your Honor allow me a few minutes?

The Court. Surely. I am going to send him back. There is not the slightest ground for not sending him, that I can see.

Mr. O'Connell. I do not want to drag it out.

Mr. Wilson. There will not be any rush about the thing.

Mr. O'Connell. Will your Honor give me, say, an hour? I want to apply for a writ of habeas corpus.

The Court. Surely. You can have that time.

Mr. Wilson. That is quite agreeable to us.

(Counsel returned to the trial table, and the hearing proceeded as follows:)

The Court. Gentlemen, I do not see any reason in
56 the world why I should not grant the application by the Governor of North Carolina for the return of this man. But Mr. O'Connell has just requested time to apply for a writ of habeas corpus, and I want to give him

the time to do it, and the United States Attorney has consented. So I am going to sign an order directing his return.

Mr. O'Connell. Will your Honor withhold the signing of that out of an abundance of caution?

The Court. Have I not got to sign it?

Mr. O'Connell. Your Honor can say right now that he must go back, but your Honor need not sign the order now.

The Court. The man is in custody under an order directing him to be extradited to the State of North Carolina.

Mr. O'Connell. When your Honor signs the order, will you direct that the Marshal keep him in his custody?

The Court. Surely. You will see that this order is not executed until counsel has had time to apply for a writ of habeas corpus?

Mr. Wilson. Absolutely, your Honor.

The Court. I suppose you will give bond?

Mr. O'Connell. Yes, sir.

The Court. Of course you are required to do it now.

Mr. O'Connell. Yes, sir. And your Honor will issue an order to the Marshal to hold him in his custody.

Mr. Conliff. An officer of the State is here, too, your Honor, but he will not attempt to take him.

(Whereupon, at 12:10 o'clock p.m., the hearing in the above-entitled case was concluded.)

57 *Transcript of Proceedings*

Filed July 2, 1940

* * *

In the District Court of the United States

For the District of Columbia

Habeas Corpus No. 2067

In re

Habeas Corpus

William D. Pelley

Washington, D. C.
Thursday, April 4, 1940.

The above-entitled cause came on for trial before Associate Justice Jesse C. Adkins in Civil Division No. 1, at 10:20 o'clock a. m.

Appearances:

On behalf of Petitioner:

T. Edward O'Connell.
Franklin V. Anderson.

On behalf of United States of America:

John C. Conliff,
Assistant United States Attorney.

On behalf of the State of North Carolina:

Robert R. Williams.

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58 *Proceedings*

Mr. Conliff. If your Honor please, I would like to present to the Court Robert R. Williams, a member of the Bar of the State of North Carolina. He has been appointed by the State of North Carolina as special prosecutor to present the facts to that Court.

I would like to present the requisition papers of the State of North Carolina and the order of Chief Justice Wheat of this court.

Mr. O'Connell. I present to Your Honor General Albert L. Cox who has a message from the Governor.

Mr. Cox. May it please the Court, I am appearing on behalf of the Governor of the State of North Carolina, who was issued a subpoena as a witness in this case.

The Governor has directed me to say to the Court and to Mr. O'Connell that he knows nothing in any way about the transaction with reference to Mr. Pelley in any particular. I have here a letter from Governor Hoey, which reads in part as follows:

"***except that I received in the mails an application from the Solicitor of the District asking for the extradition, and it was made out in proper form and I granted it in the regular routine incident to the office.

"I had no discussion with anybody about it and have no information with reference to the case in any way except such as revealed in the application for extradition,

which was honored and forwarded to the District of Columbia. However, if there is any statement about any matter that I have any information about that either Mr. O'Connell wishes or the Court desires, I will be glad to answer any such inquiries under affidavit and for-
59 ward.

"I have several engagements and it is a practical impossibility for me to get away to go to Washington on April 3rd, and my whole schedule through April and May is crowded. I am sorry to bother you, General, about this matter, but it will be a very great convenience to me if I may be relieved of the obligation to attend court about a matter of which I have absolutely no knowledge and cannot testify to anything that would either help or injure the chances of Mr. Pelley."

May I say to the Court that Governor Hoey is an outstanding lawyer of ability in North Carolina. He would be the last person in the world that I know of who would offer any disrespect to this Court by failing to answer a subpoena.

As I said to you, it is due to his official business alone for which he made promises before the subpoena was served that prevents his attendance in court today.

Therefore I ask that he be relieved of the obligation of appearing in response to the subpoena served on him.

Mr. O'Connell. If Your Honor please, I would like to say that Governor Hoey was served personally within this jurisdiction. I do not think we should be prevented at this time from showing what we expect to show by Governor Hoey's testimony. Governor Hoey is the same as any other individual before this court.

The Court. What do you want me to do?

Mr. O'Connell. I want this hearing continued until Governor Hoey is here. I have several reasons which I expect Your Honor will consider and I would like to offer
60 them to you.

First, I think that the Governor has no right to disregard this subpoena. This Court expects that it be honored.

61 The Court. Well, you are asking that it be continued until the Governor comes here?

Mr. O'Connell. Yes.

The Court. I suggest that you tell me what you expect to show by him.

Mr. O'Connell. I expect to show that none of the statements contained in his letter are true. I expect to show by the Governor, to show he was served within the jurisdiction and when we have an opportunity to have that man within the jurisdiction which he was ordered by the subpoena to honor, then he has no right to flaunt it.

The Court. What do you want to show?

Mr. O'Connell. We intend to show that the papers are not in proper order.

The Court. What would he testify to or prove? Just tell me what you want.

Mr. O'Connell. I do not think I should be forced to reveal that at this time.

The Court. If you want me to consider your motion for continuance, you will have to tell me what you expect to show.

Mr. O'Connell. Is your Honor holding that the Governor can arbitrarily refuse to come to court?

The Court. You heard my ruling. If you want to have me rule on it, you can tell me.

Mr. O'Connell. Note an exception to that.

I will state this that I intend to show that the Governor did not study the papers; that he does not know what is in the papers; that he did have a conversation with certain people before he signed the requisition; that he does have a personal interest in the Pelley case; that he has
62 discussed it with other persons who have a personal interest in the Pelley case and that the papers were not in order when the official seal was placed on those papers; that he had no idea what was in them or what papers were lost.

I can show from the deposition of Judge Nettles that there were certain papers missing from the papers.

The Court. Can you tell me what papers are missing?

Mr. O'Connell. One paper that is missing is the order to the Sheriff of Buncombe County to go forward and seize wherever it might be found—not limited to Buncombe County, not limited to the State of North Carolina.

The Court. To seize?

Mr. O'Connell. Yes, and not limited to the United States —anything of any nature which might tend to incriminate Mr. Pelley.

I intend to show that certain records of a private nature were seized in accordance with that order.

I have the North Carolina Code here which makes the issuance of such an order a misdemeanor punishable as a misdemeanor.

I can show, which is in the record now, the depositions filed, that the Judge admits issuing such an order. I intend to show that such an order was issued at the instigation of Martin Dies.

Mr. Conliff: I object to this line of argument.

The Court. Go ahead.

Mr. O'Connell. We charge a conspiracy in this case to railroad this man to jail. I intend to show, and I can show it by competent testimony that Chairman Martin
63 Dies issued a statement that he was going to North Carolina—

The Court (interposing). I want to know what the Governor will testify to.

Mr. O'Connell. I intend to show his statement that he knows what is in the papers, being in good order, is not a true statement, that he does not know what is in the papers, and I think I am entitled to show that.

He has sent his requisition here to bring a man back from one state to another. He put the official seal of the state on them. He says he does not know anything about the case and "all I did was sign the papers" and he does not know what is in them.

Why should your Honor be bound by a man who does not know what the papers contain?

The Court. Is that what you want to show?

Mr. O'Connell. I want to show that, and I want to show that it is unlawful to certify an order—

The Court (interposing). The Governor could not tell you about that.

Mr. Conliff. That is a matter of record.

The Court. Just confine yourself to what the witness will testify to.

Mr. O'Connell. That is what we have been confronted with "that it is a matter of record". It is not a part of the record of the case, and I intend to show that you are not bound by the record; you are not bound by the record if certain things were taken out of that record. That is what we have proved in this deposition.

The Judge admits issuing that order upon which the information was based that Pelley had been misbehaving himself. He admits signing the order, and the
64 Clerk of the Court admits the order is not in the file and was not sent to Washington.

The Court. I have difficulty understanding you. I understand that you expect to show by the Governor—

Mr. O'Connell (interposing). I would like to ask the Governor whether he put his seal on these papers and did he know such conditions existed. We have a right to show that.

Why should this man arbitrarily send word to this Court that he cannot come; that he is too busy?

You have heard that objection before and you have always ordered them to come before the Court. You do not grant that privilege to everybody coming here and urging it; they are ordered to come. This Court should insist on bringing this man in. He has been subpoenaed by proper order within the confines of the District of Columbia. I say it is our right to cross-examine him.

The Court. That is what you want to prove by him?

Mr. O'Connell. Yes.

The Court. I do not think the facts you have stated would be relevant, so I will deny the motion for a continuance.

Mr. O'Connell. I have another ground for the motion.

The Court. No, I won't hear you on that.

Mr. O'Connell. May I present the motion?

The Court. No, you have stated your grounds for the motion.

Mr. O'Connell. No.

The Court. I have ruled on it.

Mr. O'Connell. You haven't heard all my grounds.

The Court. I thought you were finished.

65 Mr. O'Connell. I said I was finished with the point about the Governor.

Now, there are two special prosecutors appointed by the State of North Carolina, and one of the prosecutors has been introduced to your Honor.

However, there is another gentleman by the name of Mr. Harkins who was present when we had the first hearing before Mr. Justice Wheat. Both of these gentlemen were examined by way of deposition in Asheville. Both of these men refused to answer questions saying that "We are not now at Washington, but will appear before the District Court Judge and then and there I may answer these questions if I am ordered to do so."

These questions concern the source of private compensation to these men, Harkins and this gentleman now here, where they received the money to prosecute Pelley.

The Court. Is that what you expect to prove by the Governor?

Mr. O'Connell. That is one of the things I expect to prove.

The Court. By the Governor?

Mr. O'Connell. I expect to prove—

The Court (interposing). Answer the question. Do you expect to prove that by the Governor?

Mr. O'Connell. I expect the Governor's evidence to be more or less cumulative along with other evidence that we will bring out.

I would like to have you note the names he wrote on this paper, which was read to Your Honor; Max Gardner, and Don Elias, a big newspaper man.

We intend to show that all these people are con-
66 nected with the conspiracy to have Pelley brought back on a vague charge of violating parole.

Bear in mind that this Judge who has ordered the copies issued for Pelley is the same man who stood before the jury for an hour and excoriated Pelley, as a prosecutor in this same question.

Mr. Conliff. I object to that. That has no part of Mr. O'Connell's argument for a continuance.

The Court. Confine your statement to what you expect to show by the Governor.

Mr. O'Connell. I want to show it in order to show you their refusal to answer these questions.

The Court. That is not before me.

Mr. O'Connell. I am putting it before you. It was ordered on deposition by this Court.

The Court. I understand your motion was based on what the Governor would show.

Mr. O'Connell. And also other witnesses.

The Court. Go ahead. Mention your motion and tell me the grounds.

Mr. O'OConnell. Absent witnesses. The Governor of North Carolina subsequently made Harkins a prosecutor.

The Court. Is Mr. Harkins under subpoena?

Mr. O'Connell. Mr. Harkins was under subpoena to testify in this deposition and refused to answer because he would be here today and then we discover that he is not here. Are we to be deprived of his testimony in any such manner? This Court is entitled to hear this case. That man was appointed a special prosecutor with Mr. Williams, today
67 here in this case. He was questioned about the source of his compensation, and then absents himself from this hearing with no explanation as to why he is not here.

Why do we not have a right to examine this witness when he has received his witness fee and been personally served?

Yet, they give such an excuse as that: "I refuse to testify; I will be in Washington." Then he is not here. Will Your Honor permit that?

We have no remedy; therefore we are calling upon Your Honor to be relieved.

The Court. Is that your motion?

Mr. O'Connell. Yes.

The Court. I will deny the motion. You may renew your motion after the case has progressed to the point where I am able to tell whether the testimony is of value.

Mr. O'Connell. I note an exception to Your Honor's ruling.

I want to offer this letter from Governor Hoey as evidence and as an additional ground for our motion for recontinuance. It may be marked Petitioner's Exhibit No. 1.

(Letter dated March 28, 1940, Clyde R. Hoey, to Albert L. Cox was marked Petitioner's Exhibit No. 1 for identification.)

68 *Pet. #1*

State of North Carolina
Governor's Office
Raleigh

March 28th, 1940.

Clyde R. Hoey
Governor

General Albert L. Cox,
Attorney at Law,
Shoreham Building,
Washington, D. C.

My dear General:

I have your letter of March 27th, 1940, and thank you for the interest which you have manifested in my behalf in trying to have me relieved from attendance in the Pelley trial. In the event Mr. O'Connell refuses to release me, I will appreciate it greatly if you will take the matter up with the Judge. You are authorized to say to Mr. O'Connell that I do not know anything in the world about the transaction with reference to Mr. Pelley in any particular, except that I received in the mails an application from the Solicitor of the District asking for the extradition, and it was made out in proper form and I granted it in the regular routine incident to the office.

I had no discussion with anybody about it and have no information with reference to the case in any way except such as revealed in the application for extradition, which was honored and forwarded to the District of Columbia. However, if there is any statement about any matter that I have any information about that either Mr. O'Connell wishes or the court desires, I will be glad to answer any such inquiries under affidavit and forward.

I have several engagements and it is a practical impossibility for me to get away to go to Washington on April 3rd, and my whole schedule through April and May is crowded. I am sorry to bother you, General, about this matter, but it will be a very great convenience to me if I may be relieved of the obligation to attend court about a matter of

69 which I have absolutely no knowledge and cannot testify to anything that would either help or injure the chances of Mr. Pelley.

With sentiments of esteem and regard, I am

Yours very truly,

CLYDE R HOEY

70 Mr. O'Connell. I want to urge upon your Honor that Pelley is not a fugitive and that the Court had no jurisdiction—

The Court. May I interrupt? Do you have some deposition that has been taken or have you any testimony?

Mr. O'Connell. I want to refer to the question of law before I offer any evidence. There has been no case shown as to why Pelley should be brought to North Carolina. He is not a fugitive. We say the papers do not make him a fugitive. If Your Honor will look at the papers, there is not the slightest charge against Pelley; he is not accused of any crime in the State of North Carolina.

The Court. I think you had better complete your case.

Mr. O'Connell. Mr. Pelley, take the stand.

Thereupon, **William Dudley Pelley**, the petitioner, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Connell:

Q. What is your full name? A. William Dudley Pelley.

Q. You are presently residing in the District of Columbia? A. That is correct, sir.

Q. Now, can you tell us when and where you first heard of the capias being issued for you by your former prosecutor, Judge Nettles? A. I bought a copy of the Cincinnati "Inquirer" in Cincinnati, Ohio. I turned to the

71 specific article which described this capias being issued.

Q. Do you have a copy of the article that appeared in the Cincinnati "Inquirer" as of that date? A. Yes, I

72 cut it out, sir (handing a newspaper clipping to Mr. O'Connell).

Mr. O'Connell. I want to offer it in evidence to show where Mr. Pelley first became informed of any capial.

Mr. Conliff. If your Honor please, at this point, I object to the admission of this article in evidence.

Mr. O'Connell. State the ground for the objection.

Mr. Conliff. On the ground that it is purely immaterial.

The Court. Just a second.

Mr. Conliff. The first ground of my objection to the admission of the clipping is that it does not show on its face where it came from and what newspaper it is clipped from; secondly, my objection is that it is purely immaterial to this case, which is a habeas corpus, where Mr. Pelley first became advised that a capias had been issued against him. It is immaterial with respect to the law of extradition whether a fugitive has knowledge that he is wanted by the demanding state or not.

The question is, is he wanted by the state? And is he found somewhere else? If he is found somewhere else, he is a fugitive. It makes no difference whether he has knowledge that the state wants him or not.

Mr. O'Connell. If your Honor please, I would like to say on the law of habeas corpus that I would like to correct Mr. Conliff's statement as to the law. Flight is an important element on fugitivity, and the Court can certainly inquire into the question of whether or not this petitioner deliberately absented himself from the state for the purpose of avoiding service of process in connection therewith.

The Court. I do not think that is a correct state-
73 ment of the law, Mr. O'Connell. My understanding is that he is a fugitive if he is not there when wanted.

This is hearsay. If you want to show he learned any certain time that he was wanted, you can do that, but I do not see the need for this.

Mr. O'Connell. I note an exception to your Honor's refusal to admit the newspaper clipping from the Cincinnati "Inquirer" of October 19, 1939.

May I offer or request that I be permitted by your Honor to subpoena a copy of that paper from the Library of Congress to substantiate the fact that that article did appear in that paper?

The Court. I think it can be taken that this was taken from a copy of the paper of that date.

Mr. O'Connell. Yes.

Mr. Conliff. I have no knowledge of that.

The Court. I assume it is.

Mr. O'Connell. Will it be conceded?

The Court. I cannot make them concede it, but I will assume it is a copy taken from that paper.

Mr. O'Connell. I make the further request that we be permitted to subpoena the copy of the Cincinnati "Inquirer" of that date to prove that that article did appear.

The Court. I do not think it is material.

By Mr. O'Connell:

Q. Now, do you in the course of your work travel anywhere outside the State of North Carolina? A. I travel from 50 to a hundred thousand miles by the speedometer of my car.

74 Q. That covers how many states? A. The whole 48 states.

Q. Have you been charged with any criminal offense since the time your sentence was suspended in North Carolina? A. Not to my knowledge, sir.

Q. Have you read the depositions of Judge Nettles and the other gentleman in the matter? A. I have, sir.

Q. Have you found anything in there stating that you were charged with an offense against the law of North Carolina? A. Not against the laws of North Carolina, no, sir.

Q. Did you find any charge of a violation of any other laws? A. No other laws, no, sir.

Mr. O'Connell. That is all.

Cross-Examination

By Mr. Conliff:

Q. Mr. Pelley, isn't it a fact that you were convicted by a jury in the State of North Carolina?

Mr. O'Connell. We will stipulate that. We will stipulate as to the conviction and we will stipulate as to the sentence.

Mr. Conliff. Now, with respect to that sentence, Mr. O'Connell, do you stipulate that the sentence is as recorded in the papers signed by the Governor?

Mr. O'Connell. I would like to see a copy of the judgment.

(A document was handed to Mr. O'Connell.)

Mr. O'Connell. We will stipulate that is the judgment of the Court. I think it could be marked.

Mr. Conliff. For the purpose of the record, I
75 would like to have stipulated that Mr. Pelley was convicted on two counts of the indictment.

Mr. O'Connell. We will stipulate that.

Mr. Conliff. He was convicted in the State of North Carolina on January 22nd, 1935, on two counts in the indictment.

Mr. O'Connell. Of a 16-count indictment.

Mr. Conliff. The first count under which the defendant was convicted charged the violation of the so-called state "Blue Sky Law"; the second count under which he was convicted charged a violation of the law with respect to false representation in connection with the sale of securities in the State of North Carolina.

Will you stipulate on that?

Mr. O'Connell. I did not stipulate as to that last statement; I stipulated that he was convicted of two counts on the judgment which is part of the record that your Honor has before you.

Mr. Conliff. The indictment shows what counts he was convicted on.

The Court. Is that indictment in here?

Mr. Conliff. Yes, your Honor.

The Court. The first and second?

Mr. Conliff. Yes.

Mr. O'Connell. May I see that?

The Court. Is that correct?

Mr. O'Connell. No, the judgment does not indicate that. The judgment merely recites that he was convicted without reciting what the contents were.

Mr. Conliff. The minutes of the Court also con-
76 tained in these requisition papers show which counts the defendant was convicted on.

The Court. I cannot place my hands immediately on the judgment. Do you know where it is?

Mr. Conliff. Yes, if I may assist your Honor, I think I can. It is near the front part.

The Court. Were there counts dismissed?

Mr. O'Connell. Three counts went to the jury. He was convicted on two and found not guilty on the other one.

The Court. This minute shows that the jury brought in a verdict of guilty as charged on the first and second counts in the indictment, and not guilty as charged in the seventh.

Do you stipulate that as correct?

Mr. O'Connell. I won't stipulate. I mean, if the record shows that—

Mr. Conliff. Further, I want to bring out from this witness or by stipulation if Mr. Pelley was sentenced on February 18, 1935.

The Court. Is that in evidence?

Mr. O'Connell. We will stipulate that.

The Court. He was sentenced on February 18, 1935.

Mr. O'Connell. That is right.

The Court. Is that exact sentence in the record?

Mr. O'Connell. One to two years at hard labor. That is on one count, and the sentence was suspended on the second count.

Mr. Conliff. Prayer for judgment was continued for five years, and the sentence was never imposed on the second count.

Mr. O'Connell. Would you read back the last statement of Mr. Conliff, Mr. Reporter?

77 (The last statement of Mr. Conliff was read by the reporter.)

Mr. O'Connell. That is right. We will stipulate that.

Mr. Conliff. Now, Mr. O'Connell, with reference to the sentence of February 18, 1935, is it stipulated that prayer for judgment was continued for five years, so the five years would not expire until February 18, 1940.

The Court. I can conclude that.

By Mr. Conliff:

Q. You became aware that the Court in North Carolina wanted you in October of 1939; is that correct?

The Court. He has already testified he read this paper.

The Witness. Only through hearsay in that newspaper clipping.

Mr. O'Connell. There is some backfire.

The Court. Do you want the clipping in?

Mr. Conliff. I don't object to him testifying that he became aware of it.

Mr. O'Connell. Do you want to stipulate that?

Mr. Conliff. I only object to the source of the information being introduced into Court.

The Court. Is that all?

Mr. Conliff. That is all.

Mr. O'Connell. Step down.

(The witness left the stand.)

Mr. O'Connell. Mr. Williams.

78 Thereupon, **Robert R. Williams** was called as a witness for and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Connell:

Q. Mr. Williams, you are a resident of Buncombe County in North Carolina? A. I am.

Q. How long have you lived there? A. Continuously since January 1st, 1907.

Mr. O'Connell. May I announce at this time that I present Mr. Williams as a hostile witness.

By Mr. O'Connell:

Q. You were served with a subpoena to appear for the taking of your deposition, were you not, on March 26, 1940? A. I was served with a subpoena. I think that was the date.

Q. You did appear in conformity with the conditions stated on that subpoena? A. I did, yes.

Q. You were interrogated on March 26, 1940? A. Yes.

Q. I ask you whether or not you have ever appeared before as a special prosecutor of Mr. Pelley.

Mr. Conliff. I object to that question.

Mr. O'Connell. I intend to connect it up, in ac-
79 cordance with my previous statement, that we intend to show the conspiracy, that there was no charge pending against him, and that the whole proceeding is a frameup. I think we are entitled to show that.

I say and I intend to show by this witness that he has received and is receiving private compensation from sources

which he refuses to disclose and that he has an interest in this case.

I intend to show that he previously prosecuted Pelley in a previous action and received private money, the sources of which he refuses to disclose.

I call your Honor's attention to the deposition attempted to be taken from him in which he stated that he considered it not to be the business of the questioner, of this court or anybody else where he received private compensation from in this case.

This all goes to the Congressional authorization for extradition, which says that extradition shall not be permitted for any private purpose. We intend to show that the purpose of seeking this man is a private purpose and not a bona fide prosecution under the law of the State of North Carolina.

The Court. What is the private purpose?

Mr. O'Connell. The private purpose is to put Pelley in jail for certain private parties not officially connected with the proceedings. I think we have a right to show that.

Mr. Concliff. May I make a statement?

The Court. Yes.

Mr. Conliff. Mr. O'Connell is trying to show the background of why Mr. Pelley is wanted in the State of North Carolina. That I submit is not admissible. The
80 Court of Appeals in this District has ruled upon that in any number of cases. I have cases before me in which they decided that. The Supreme Court of the United States has ruled on it.

In Blevins vs. Snyder, 57 Appeals, D. C., it is stated 'that in a hearing on habeas corpus in an extradition proceeding, the Court is entitled to assume that the demanding state has no other object in view than to enforce its laws and that it will see to it that the accused is legally tried."

The Supreme Court does go on to hold that extradition is to be wholly in accordance with the statutory provisions in accordance with the Constitution, and the questions that can be determined on habeas corpus are the same questions presented to the Governor who decides whether the man is to be extradited, and these questions are: first, whether the defendant is the same man named in the requisition papers.

That question is not before the Court.

Secondly, whether or not the defendant is substantially charged with a crime against the laws in the demanding state, which is the State of North Carolina; thirdly, whether the defendant is a fugitive from Justice.

I do not think there is any doubt about that.

Mr. O'Connell. He is not a fugitive from justice and the Court had no right to order him back.

I would like to call your Honor's attention to what the Supreme Court of the United States decided.

The Court. Do you have the extradition statute here?

Mr. Conliff. Yes.

The Court. May I see it?

Mr. Conliff. Yes.

81 In Roberts vs. Riley, 116 U. S. 80, the Supreme Court of the United States say:

"As it is the requisition, a Governor looks for authority to issue his warrant, no copy of the laws of the demanding state need be submitted to him to prove that the requisition is properly founded."

In the case of Goodale vs. Splain, 42 Appeals, D. C., 235, the Court said:

"That matters of defense to the charge or whether the proceedings are instituted by malice or improper motives will not be considered in habeas corpus proceedings."

In Marbles vs. Creecy, 215 U. S., 63, the Court said:

"It is within the province of the Governor to require the production of satisfactory evidence of the jurisdictional facts which must be found before he issues his warrant, but these facts may be determined in any way which the executive, to whom the requisition is addressed, deems satisfactory, and he is not required to demand proof apart from the proper requisition papers."

In other words, the question of whether or not this defendant is substantialy charged with a crime should be considered from the papers and the papers alone. The Governor of the State of North Carolina has authenticated, under the seal of the State of North Carolina that certain papers included in that requisition are true copies of these

papers; that this man was indicted; that he was con-
82 victed in the State of North Carolina; that he was sentenced in the State of North Carolina; that sentence was imposed on one count and had not terminated when the Court wanted him back to determine whether the suspended sentence should be put into effect; that the second count on that the defendant was never sentenced, and prayer for judgment was continued for five years; that when they continued the term of the Court for five years, the state wanted him back for the purpose of sentencing.

There is no question in the world that the man is still charged with the crime for which he has not served this sentence.

In Reed vs. Colpoys, 69 Appeals, D. C., 163, where the Court had the question of whether or not a man who violated his parole, whether he is still charged with a crime, and the Court stated the doctrine which has been held by the Supreme Court and every Federal Court in this country, and that is that he is still charged with a crime until the judgment is satisfied, and the contention of the Government is that Pelley has not completed the service of his sentence. He was never sentenced on the second count. In view of the fact that the Governor has certified that he is still charged with a crime, anything extraneous to that is irrelevant.

Mr. Williams has appointed a special prosecutor to present the matters to the Court in North Carolina. He has nothing to do with the extradition case. I did not call him as a witness in the original extradition proceedings before Mr. Justice Wheat. The question as to who employed him is entirely collateral to the issue here. Mr. O'Connell is trying to attack the judgment of the Court.

The Court. Have you any authorities?

83 Mr. O'Connell. I have plenty of authorities. I have this, Johnson vs. Zerbst, 304 U. S. 458.

Mr. Conliff. Does that refer to extradition cases?

Mr. O'Connell. Yes.

The Court. What is the case?

Mr. O'Connell. Johnson vs. Zerbst, 304 U. S., 458. That is not over four months old.

In that case the Court quoted 92 Federal 2nd, 748, the following:

"It has been repeatedly held that the writ of habeas corpus may not be substituted for a writ of error or appeal. If the Trial Court had jurisdiction, it is only in extraordinary cases where the circumstances surrounding the trial makes it a sham and a pretense, that the writ will lie on the ground, that the judgment is a nullity for want of due process of law even though it be alleged that the accused has been denied rights guaranteed by the Constitution."

As to the views of Judge Underwood and the judges of the Fifth Circuit, the Supreme Court, through Mr. Justice Black had this to say:

"True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of the trial, and the writ of habeas corpus cannot be used as a writ of error. These principles however must be construed and applied so as to preserve—not to destroy
84 —constitutional safeguards of human life and liberty."

The Supreme Court said further in the same case:

"The scope of inquiry in habeas corpus proceedings has been broadened not narrowed, since the adoption of the Sixth Amendment."

That is important in connection with what Mr. Conliff said as to what we are confined to.

The Supreme Court said:

"In such an inquiry, it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the Trial Court (citing Frank vs. Mangum, 237, U. S. 309) and the petitioned Court has power to inquire with regard to the jurisdiction of the inferior Court, either with respect to the subject matter or to the person, even if such inquiry involves and—"

And this is most important, in answer to Mr. Conliff:

"—even if such inquiry involves an examination of facts outside of but not inconsistent with the record."

This is the situation: Here is a man appearing here in Court in a matter of record about which he is a special

prosecutor especially appointed by the Governor or Judge down there.

They both state they consider it to be their duty to be at the hearing, and yet the other gentleman absents himself, despite his duty, he absents himself when he was asked the source of his compensation.

Certainly this man has a right to know who his ac-
85 cusers are, and if private parties are prosecuting this gentleman, we can back it up with evidence.

I would like to read further what Justice Black said about the scope of the inquiry to which your Honor is confined in habeas corpus.

Mr. Conliff. If I may interrupt.

Mr. O'Connell. I did not interrupt you.

Mr. Conliff. This is not a habeas corpus growing out of an extradition proceeding.

Mr. O'Connell. This is habeas corpus.

Mr. Conliff. This is habeas corpus, but there is a world of difference.

The Court. I have the case. Suppose you let me glance at it.

Mr. O'Connell, I do not see in this statement any requirement that the demand from the Governor shall state that there is no private purpose.

Mr. O'Connell. The laws of the State of North Carolina provide for such a thing.

The Court. I am not familiar with that.

Mr. O'Connell. I will offer your Honor that.

I do not know whether you have Jerome's Criminal Code and Digest, 1934-1935, North Carolina, 5th edition, in the library, page 345, but this is what is required to bring a man back to North Carolina, and they must appear by the certificate of the district prosecuting attorney:

"a. The full name of the person for whom an extradition is asked together with the name of the agent proposed, to
be properly spelled in Roman capital letters, as,
86 for example, John Doe;

"b. That in his opinion, the ends of public justice require that the alleged criminal be brought to justice to this State for trial at the public expense;

"c. That he believes he has sufficient evidence to secure a conviction of the fugitive;"

I have here a definite statement by the present prosecutor of Buncombe County that there is no evidence upon which they can possibly base a conviction of Mr. Pelley.

Mr. Conliff. I object to that.

Mr. O'Connell. I will offer that.

Mr. Conliff. It is absolutely immaterial.

The Court. Just a minute. I can listen to only one at a time.

Mr. O'Connell. I now offer a copy of the Asheville "Advertiser".

I would like to ask Mr. Conliff to stipulate that this is a copy of the Asheville "Advertiser" in which the present prosecutor of Buncombe County makes a statement that Pelley will never be convicted; that to his knowledge the State has no evidence upon which to hold Pelley.

Then again, he is the same man who asked the Governor to issue a requisition for Pelley, and that requisition is supposed to comply with the laws of the State of North Carolina.

To resume with the rules of practice with respect to the requirements of the State of North Carolina,

"d. That the person named as agent is a proper person, and that he has no private interest in the arrest
87 of the fugitive;

"e. If there has been any former application for requisition for the same person growing out of the same transaction, it must be so stated with an explanation of the reasons for a second request together with the date of such application as near as may be;

"f. If the fugitive is known to be under civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated;"

And this is important:

"g. That the application is not made for the purpose of enforcing the collection of a debt or for any private purpose whatever, and that if the requisition applied for

be granted, the criminal proceedings shall not be used for any said objects;

"h. The nature of the crime charged with a reference, when practicable, to the particular statute defining and punishing the same;

"i."—and this is most important—"If the offense is not of recent origin, a satisfactory reason must be given for the delay in making the application."

88 Mr. Pelley, under a suspended sentence for four years and eight months, with no notification of anything against him, criminally or civilly, suddenly has a capias issued against him by the Judge down there with no reason given other than the Judge says the five years is about to expire. Certainly, your Honor has never heard of such a thing since you have been on this bench.

If your Honor will look at the papers, there is the order signed by this Judge in which he says that he has already sentenced Pelley; judgment is about to be entered. If your Honor will look at the order—they do not put any caption in it, but this is a copy of the order—if you will look at what I have underlined, you will see that they have already determined down there that Pelley has violated the law despite the provision that he is entitled to a hearing.

Now, if your Honor will notice in the copy of the order, which is in the papers there, the Judge has extended the period of suspension, the suspension, for five years more.

In that connection, I would like to show you what the Code says about extending the period of suspension of sentence or parole. I am reading from Section 4665, paragraph 4 of the North Carolina Code with the caption, "Termination of Probation, Arrest, Subsequent Disposition":

"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the Judge of the Court and may be continued or extended, terminated or suspended by the Court at any time within the above limit", five years.

89 Yet, this prosecutor, who is now Judge arbitrarily continues the five years after the five years had expired. It has been stipulated that the five years started on February 18, 1935. Of course, the five years expired on February 18, 1940.

In the deposition, the Clerk of the Court stated under oath that the February term started on February 19th, and this order was entered the first day of the February term, one day after the five years had elapsed.

Now, Mr. Conliff is going to argue about the issuance of the capias, in that connection, or that the issuance of the capias kept the five years from running. Why was another order issued by the prosecutor, now Judge, extending it for five years, without any authority in law? That Court has no jurisdiction. This is a prosecution for a private purpose and not for a public purpose.

Has your Honor ever heard of anybody going into Court, presenting themselves to that Court, and then refusing to reveal whom they represented and who was paying them? That is what has occurred in this case.

Now, we have been continuously confronted with the statement "that we stand on the record." The Clerk of the Court of Buncombe County—

The Court (interposing). Do you have any cases in which this question was raised and the Court has considered it?

Mr. O'Connell. I don't think anybody has ever seen such a barefaced case, to consider it. This matter is brought into this Court, and when I tell your Honor—

The Court (interposing). Do you have any such cases?

Mr. O'Connell. I have not discovered a case in-
90 volving a private prosecution or anything else where the person refused to reveal the source of his compensation.

The Court. Is there any case in which an attempt was made to show the purpose of the extradition? Do you have any case in which that question was raised? Where you read the decision of the Court of Appeals and that the Court of Appeals said, but I can't tell from that whether the question was raised or not.

Mr. Conliff. If your Honor please, I have not gone exhaustively into that phase of the question, affecting the private purpose, because all the cases from our Court of Appeals and the Supreme Court of the United States are in unanimity that it is not proper to go into the motive for an extradition and it is a statutory requirement that the Governor must certify that the indictment is authentic.

I haven't any case on that point, but I know there are many cases which say that a man cannot be extradited for the collection of a private debt if he is not charged with a crime.

That goes back to one of the elements of extradition as to whether or not a man is substantially charged with crime, but Mr. O'Connell is trying to bewilder the issue.

The Court. How is the Court to determine that, whether it is to collect a debt? What is the turning point?

Mr. Conliff. By the indictment in the case or the information in the case properly sworn to.

The Court. They do not show it is an effort to collect a debt. How can this be an effort to collect a debt?

Mr. O'Connell. We do not say it is an effort to collect a debt; we say it is a private prosecution.

The Court. I don't know. I want to know what
91 the law is. He says he can show me.

Mr. Conliff. It can't be for that purpose, because the requisition papers speak for themselves and it is immaterial what purpose is behind them. The Governor of the state has certified them, that this man had been convicted on two counts of an indictment. On one count he has never been sentenced. The Court of this county wants him back for sentence.

Mr. O'Connell. I would like to read this to your Honor—

The Court (interposing). Just a minute. Do you have any cases?

These papers always contain a statement that somebody wanted for extradition is not sought for a private purpose. You say that does not make any difference. Do you have any authorities? If it is a false statement, the falsity can be shown. If you have any authorities to that effect, you may show them to me.

Mr. Conliff. I have authorities, but I can't cite them now. but I can get them for your Honor in a few minutes.

The Court. How long will it take?

Mr. Conliff. I think about 15 minutes.

The Court. All right. We will take a recess until you can get these authorities.

(There was a brief recess taken, at the conclusion of which the following proceedings were had:)

The Court. All right. Proceed.

Mr. Conliff. I did not give myself very much time to exhaust the authorities, but I have before me a case of Blevins vs. Snyder, 57 Appeals, D. C., page 300, and at page 301, the Court of Appeals says:

92 "The third assignment of error is based upon allegations in the petition for habeas corpus to the effect that the finding of the indictment was a part of a scheme or conspiracy to collect a debt. This Court held in Goodale vs. Splain, 42 Appeals, D. C., 235, 239, that 'matters of defense to the charge, or whether the proceedings were instituted by malice or improper motives' will not be considered in habeas corpus proceedings."

Also, take the case of Drew vs. Thaw, 235 U. S., page 432. This was an extradition proceeding wherein Harry Thaw had been in an insane asylum in the State of New York and he escaped and was found in New Hampshire. He was indicated in the State of New York, as I recall it, for conspiracy to obstruct justice in attempting to escape from this insane asylum.

At the hearing it was contended that an indictment such as that was not proper in that he could not be indicted for escaping from an insane asylum; and secondly, if he was a insane man, he could not be indicted because he was not responsible for his actions.

As I recall the case, the question was raised then as to the motives of the Governor of the State of New York, and the Court said that:

"The Courts on habeas corpus will not inquire into the motives which have induced a Governor to grant, honor or refuse a requisition, since such an inquiry would be opposed both to the plainest principles of public policy and to freedom of action by the executive within his constitutional authority."

93 Other cases go on to say that the signing of the certificate of requisition by the Governor is a proper executive action, and the Court has no right to look behind it.

Now, with respect to the statute which Mr. O'Connell quoted as to the requisites of the rendition warrant, there

must be a statement in there that this is to enforce a private claim. Now, a private claim surely means the same as a private debt. That is, some judgment, some money judgment against him. That is a private claim.

Mr. O'Connell. May I correct Mr. Conliff? Reading from Section G, that provides that the application is not for the purpose of enforcing the collection of a debt or for any private purpose whatsoever.

Mr. Williams. May I be heard?

The Court. Just a minute.

Mr. Conliff. If I may use this North Carolina Code, in the North Carolina Code.

The Court. Just a second while I glance over this.

Proceed.

Mr. Conliff. In the 1939 Code of North Carolina, there is a probation section, 4556, subsection 23, I, which section provides for the application for issuance of a requisition.

Under this Roman numeral I, it states, "The ends of justice require the arrest and the return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim."

I think the application for the extradition warrant contained in the official papers under the affidavit by the Solicitor, shows that statement.

94 The Court. Is this later than the one that Mr. O'Connell read?

Mr. Conliff. Yes, I believe it is.

The Court. Have you got what you read from Mr. O'Connell? You were reading from Jerome's Digest.

Mr. O'Connell. This relates to the practice of the Executive Department of the State of North Carolina (handing a document to the Court).

The Court. These purport to be the rules of practice of the Executive Department.

Mr. Conliff. The other is the Code of Laws.

Mr. O'Connell. Before the requisition can be issued—

The Court (interposing). The statute seems to be, it is not to enforce a private claim.

Mr. Conliff. I have another case, a Florida case, the case of Chase vs. State, 93 Florida, page 963. On page 976, the Court states:

"Evidence that the charge against one sought in extradition proceedings was made on improper motions, and that he was not guilty of the crime charged, will not satisfy his release from custody under a writ of habeas corpus, where the proceedings are in exact compliance with the Constitution and the laws of the United States."

Then, they quote the case of Commonwealth vs. Superintendent, County Prison, 69 Atlantic 912.

I have other cases that I think make clear that extradition is a summary proceeding which is governed by the constitutional provisions and the statutes of Con-
95 gress pursuant to the Constitution.

If the papers are duly authenticated by the Governor, and a certified copy of the indictment is in the papers, a true notice of the Court showing the conviction, and the sentence of the person, the only question before the Court then is whether or not the crime as charged is a substantial one and whether or not he is a fugitive from justice.

In this case this defendant was convicted of two crimes. On count one, his sentence was suspended for five years, a sentence of from one to two years. He was placed on a suspended sentence, on probation under certain conditions.

On the second count, the Court continued judgment for a period of five years. The Court had the right at any time within the five years to bring that defendant back for sentence. The defendant consented to that judgment at the time. He did not note an appeal. He had ample opportunity to do so. If he did not think he was receiving a fair trial or that the evidence was not given the weight it should have been given or that he was deprived of due process of law, then he had a right to appeal; he had a right to go to a higher Court in the state, but he did not do it; he consented to it, on this suspended sentence on the first count and the continued sentence on the other count.

He was not sent to the penitentiary. He was glad to get such a sentence. Then the time came when the Judge in the Court determined that he should be brought back before that Court for sentence.

No one has the right to inquire why a Judge brings them back before them for sentence, if he has the right to impose

sentence. He had that right, but that is not before
96 this court to determine whether the proceeding in another court was proper according to their Code to decide whether he is charged with crime.

The Governor has certified that he is still charged with crime in North Carolina; he is still a fugitive, so when the question came up before Chief Justice Wheat, he decided that the requisition papers alone showed that the man was substantially charged with crime, and he ordered him returned.

Again, we say that the only question is whether or not the man is substantially charged with crime. We submit that he is charged with crime and should be returned to the State of North Carolina for disposition of the case.

Mr. Williams. May I say something?

The Court. Mr. Williams.

Mr. Williams. I do not intend to argue at length, but I just want to clear up the matter of that statement in the application where Mr. O'Connell stated the statute provided—

The Court (interposing). Mr. O'Connell was reading from the executive regulations which were in the Digest.

Mr. Williams. These were before this new statute was passed. This is a recent statute which covers the extradition rule.

Mr. O'Connell. If that was passed two years after sentence was imposed on Pelley, as to Pelley, of course, it will be ex post facto.

The Court. I don't know what the conditions would be.

Mr. O'Connell. I urge upon your Honor the fact that anything that changes the condition whereby the severity of the sentence may be enlarged in any particular
97 is certainly ex post facto. We urge that upon the record.

I would like to have your Honor hear what the Supreme Court of the State of North Carolina says about the sentence identical with that imposed upon Pelley.

The Court. All right.

Mr. O'Connell. May I read to your Honor the leading case on the subject in North Carolina, on the question of the suspension of sentence where the judgment on one count was reserved.

The leading case is State vs. Crook, 115, North Carolina, 760, the head note, which is as follows:

"It is familiar judgment that a Court has no power to impose two sentences for a single offense as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count at a subsequent term, superadding imprisonment."

That is State vs. Crooke, 115 North Carolina, 760.

The Court. You mean, for the same crime.

Mr. O'Connell. The same crime on different counts.

The Court. Was it the same crime?

Mr. O'Connell. Yes, separate counts. He was indicted on 15 or 16 counts.

I would like to read this. It does not restrict itself to one count or one charge.

The Court. Just a second. Your proposition is that two offenses charged in the indictment, that sentence may not be suspended on one?

Mr. O'Connell. Where sentence is imposed on the
98 other, reserving the right to sentence, sentencing on one count and reserving the right to sentence on the other.

The Court. These are different offenses.

Mr. O'Connell. Different counts, different offenses.

I want your Honor to hear what the Court said in its opinion about the question of sentencing on one count and reserving on the other count. The Court stated:

"It is familiar learning that a Court may suspend the judgment over a criminal in toto until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count after a subsequent term, or by imposing a fine and at a later term superadding an imprisonment."

Then they cite the case of State vs. Ray, 50 Iowa 520; State vs. Miller, 6, Baxter, Tennessee, 513; State vs. Watson, 95 Missouri 411; People vs. Felix, 45 California 163; Thurman vs. State, 54 Arkansas, 120; Wharton's Cr. Pl. and Prac., Sec. 913; Whitney vs. State, 6 Tennessee, 247.

"The judgments, orders and decrees of a Court, as a general rule, are under its control and subject to modification during the term at which they are entered; but where a defendant has undergone a part of the punishment, the sentence cannot be revoked and another, except in diminution or mitigation, substituted for it, because he would be twice placed in jeopardy and twice subjected to punishment for the same offense."

99 They are referring there to sentencing on different counts.

The Court. In this same volume, I find another decision which states that where a Governor is invested by law with discretion to issue a warrant for the arrest of a fugitive from justice of another state upon the requisition of the executive thereof, and to revoke it, if, in his opinion, the warrant is sought for ulterior purposes; and, although the Court may review and control his action in regard to points of law involved in extradition proceedings, yet they will not inquire into the motive and purpose of such proceedings, or interfere with any matter connected therewith which lies within the discretion of the Governor.

Then if the Governor has issued a warrant, the Court may not review his discretion.

Mr. O'Connell. That is what I wanted to show by the Governor that he did not conduct any such review, and he is under obligation to do it.

The Court. This is in re Sultan, page 57, of North Carolina Report, 115.

So far as the case you cited is concerned, that is fine, but you mentioned these other cases, but they refer at the same time to two counts for the same offense. My understanding is that the Supreme Court has held and Federal Courts, that the Court may impose sentence on one count in an indictment and place the accused on probation as to another count, which I think would be contrary to the view taken.

Mr. O'Connell. I would like to refer you to the case of U. S. against Greenhaus.

100 The Court. Just a minute. Let us get back to the testimony of the witness. Do you want to ask him a certain question.

Mr. O'Connell. Yes, and I would like to have your Honor hear us.

The Court. Do you want to discuss that point further?

Mr. O'Connell. With the right to inquire, yes.

In the case of Frank vs. Mangum, 237 U. S., 309, the Supreme Court said:

"The Courts of the United States upon an application for a writ of habeas corpus in behalf of a person held in custody under the final judgment of a state court of criminal jurisdiction may look beyond forms and inquire into the very truth and substance of the causes of the detention."

We say that the cause of this detention is to serve a private purpose, which is forbidden by the law of the state and the rules of practice of the State of North Carolina.

The Court said:

"You may look beyond forms and inquire into the very truth and substance of the causes of the detention, although this may necessitate an inquiry into the judicial facts outside of the record of his conviction."

That is what we offer to show, that this is to serve an ulterior purpose.

The Supreme Court said in re Mayfield, 141 U. S., page 107:

101 "This Court"—

That is, the Supreme Court stated:

"This Court has power upon habeas corpus to inquire as to the jurisdiction of the inferior court, either with respect to the subject matter or person, even if such examination involves an examination of facts outside of, but not inconsistent with the record."

Now, as to the tendency to liberalize the procedure in habeas corpus proceedings and the evident intention of the Supreme Court to safeguard the constitutional protection, Justice Black, lately appointed to the Court said—

The Court (interposing). You are reading from his opinion? That is the case of Johnson vs. Zerbst?

Mr. O'Connell. Yes.

The Court. I read that. That is the same brief you handed me.

Mr. O'Connell. This is Johnson vs. Zerbst.

The Court. That is the brief in the case?

Mr. O'Connell. It is a habeas corpus case.

"There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results under the sections cited, a prisoner in custody pursuant to a final judgment of a state court of criminal jurisdiction
102 may have a judicial inquiry in a court of the United States into the very truth and substance of the cause of his detention."

Now, that is why we say we can go outside the record to show the real purpose. We are not bound by the record in this case, which would be to say that your Honor sits there as a stooge to accept those papers and to say "My hands are tied." If that were the case, Burns would have been ordered back from New Jersey when they wanted to send him back to the chain gang for life.

Now, I shall read further from what Justice Black said in that case:

"Although it may become necessary to look behind and beyond the record of his detention to a sufficient extent to test the jurisdiction of the state court to proceed to a judgment against him. It is open to the courts of the United States upon an application for a writ of habeas corpus to look beyond form and inquire into the very substance of the matter."

You are not bound by the record. You can take these gentlemen and examine them and find out whether a private purpose is being served. That is why I asked this question of Mr. Williams: Who is paying you your compensation in this matter?

The Court. That is the question you object to?

Mr. Conliff. This question, yes.

The Court. I sustain the objection.

Mr. Conliff. I will ask this question.
The Court. Just resume the stand.

103 (The witness Williams returned to the witness stand).

By Mr. O'Connell:

Q. Who pays you your compensation to assist as a special prosecutor in the first trial of Mr. Pelley?
Mr. Conliff. I object.
The Court. The same ruling.
Mr. O'Connell. This is all offered for the purpose of showing that this proceeding was to gratify a purely private purpose and in violation of the rules of legal procedure of the State of North Carolina and in violation of the Constitution of the United States.
The Court. As I read these authorities—
Mr. O'Connell (interposing). You haven't read any of mine.
The Court. I have read the Zerbst case.
Mr. O'Connell. I will quote from American Jurisprudence, volume 22, page 254:

"Where a warrant of extradition is sought for some ulterior purpose, as for instance, the collection of private debts or the gratification of personal malice, it is within the power of the Governor of the State to refuse to issue it."

The Court. Is it the Governor you are talking about?
Mr. O'Connell. I beg your pardon.
The Court. You are talking about the Governor?
Mr. O'Connell. It comes down to this—
The Court (interposing). Is it within the Governor's discretion as to whether or not he shall issue it?
Mr. O'Connell. Yes, within the Governor's dis-
104 cretion.
I want to show to your Honor that the very purpose of this is—
The Court (interposing). We will suspend for a few minutes to have a jury come in.

(Thereupon there was a brief informal recess, at the conclusion of which the proceedings were resumed as follows:)

The Court. Now, Mr. O'Connell, the rule that you have urged is limited to the power of the Governor. If the Governor issues a warrant of rendition, it is the general rule, although not the universal rule, that on the hearing of the habeas corpus sued out for the liberation of the one who is sought to be extradited for the violation of the criminal laws of another state, is not admissible to hear evidence or to inquire into the motives or purpose of the prosecution or into the motives of the Governor of the demanding state.

Mr. O'Connell. That does not cite U. S. cases.

The Court. It cites as to the present proposition that you cannot inquire into the motives or purpose of a prosecution. They cite Drew vs. Thaw, 203 U. S.

Mr. O'Connell. Every one of those is prior to 304. Every one of them was overruled.

The Court. The Supreme Court can overrule itself, but I cannot.

Mr. O'Connell. But when it overrules itself, you are bound by the rule. That is the leading case.

The Court. I haven't the law.

Mr. O'Connell. I say your Honor is bound to consider the later decision of the Supreme Court on the same
105 subject. As far as the consideration goes, the previous case is out of the picture. They are overruled. The latest decision is 304, Johnson against Zerbst.

The Court. I am not reaching the conclusion that Johnson vs. Zerbst overrules Drew vs. Thaw.

Mr. O'Connell. It does overrule the fact that we are not bound by the record. It says you may inquire into anything to see that substantial justice is done.

The Court. I have ruled on it, Mr. O'Connell.

By Mr. O'Connell:

Q. I would like to ask this witness whether or not he was appointed a special prosecutor immediately after the issuance of the order by Judge Nettles for a search of the premises of Pelley.

Mr. Conliff. I object to that.

The Court. The same ruling.

Mr. O'Connell. We can't offer a copy of that order because it has been stolen from the files in this case.

Mr. Conliff. I object to that statement. That order was issued.

Mr. O'Connell. For the purpose of the record, I now offer the order, which has been refused to be certified by the Clerk of the Court of Buncombe County because the original is no longer in the files.

The Court. I can't receive it.

Mr. O'Connell. I ask that it be marked Petitioner's Exhibit No. 3 and I note an exception to your refusal to receive it in evidence.

106 (Order was marked Petitioner's Exhibit No. 3 for identification and is as follows:)

In the Superior Court

"North Carolina
Buncombe County

"STATE

vs.

"W. D. PELLEY

Order

"The Court having issued a capias for the above named defendant and it appearing to the Court that there exists in Buncombe County much material evidence which is necessary and important for the State in this matter.

"It is, therefore, ORDERED that the Sheriff of Buncombe County be, and he hereby is authorized and directed to take possession of any material or thing of any nature whatsoever, whereever the same may be found, which may be of any materiality to this cause or any other criminal action against the said W. D. Pelley of any nature whatsoever, and hold and preserve said material or thing or things as evidence until further orders of this Court.

"This the 19th day of October, A. D. 1939.

_____

Judge Presiding."

By Mr. O'Connell:

Q. I would like to ask you, Mr. Williams: Where is Mr. Harkins today?

Mr. Conliff. I object to that.
The Court. The same ruling.

By Mr. O'Connell:

107 Q. You were appointed special prosecutor by Judge Nettles along with Mr. Harkins?
Mr. Conliff. I object to that. I have no objection to Mr. Harkins.
Mr. O'Connell. You offer him to the Court as the attorney of record.
Mr. Conliff. I did not introduce Mr. Harkins.
The Court. He may answer the question.

By Mr. O'Connell:

Q. Mr. Harkins was appointed along with you as special prosecutor? A. Mr. Harkins and I were appointed as special prosecutors by Judge Nettles without our knowledge.
Q. Or consent? A. Yes, if it was without consent it was without our knowledge.
Q. Is the State of North Carolina paying you?
Mr. Conliff. I object to that.
The Court. Sustain the objection.
Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. Have you received any money in addition to any compensation received in this matter of the prosecution of Pelley?
Mr. Conliff. I object.
108 The Court. Sustain the objection.
Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. Do you recall appearing in Asheville to answer your deposition? Do you recall this question:

"Did you ever apply for a receivership, as attorney for anybody else, for a receivership for Pelley's concern?"

Mr. Conliff. I object.
The Court. Sustained.
Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. Have you ever confered with any member of the Dies Committee relative to having the sentence, previously suspended, imposed upon Pelley?

Mr. Conliff. I object.

The Court. Sustained.

Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. I ask you whether or not you have read any of the papers seized from Pelley's plant in Asheville as a result of the order to the sheriff to go out and seize them, issued to him, without a search warrant.

Mr. Conliff. I object to that.

The Court. Sustained.

Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. I ask you this question, whether you have personal knowledge of the information upon which Judge
109 Nettles issued the capias.

Mr. Conliff. I object to that.

The Court. I sustain the objection.

Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. I asked him whether or not he conferred with Barker, the investigator of the Dies Committee, prior to the issuance of the capias in this matter.

Mr. Conliff. I object.

The Court. Who?

Mr. O'Connell. This witness.

(There was no answer.)

Mr. O'Connell. I ask that this paper be marked petitioner's exhibit No. 4.

(Newspaper clipping, Asheville "Citizen", Tuesday morning, September 12, 1939, was marked petitioner's exhibit No. 4 for identification.)

By Mr. O'Connell:

Q. I ask you whether or not you can identify that paper as a copy of the Asheville "Citizen" of Tuesday morning, September 12, 1939.

(There was no answer.)

Q. Can you?

(There was no answer.)

Q. Can you recognize that? A. I can't identify it at the moment, Mr. O'Connell.

Q. Is there anything about it that causes you to
110 doubt it?

The Court. Cannot we assume that it is?

Mr. O'Connell. If I have no objection.

Let us assume it is.

I offer this in evidence as petitioner's exhibit No. 4.

By Mr. O'Connell:

Q. Do you know anything about the facts stated therein: "Representative Dies strikes back at Silver Shirt chief."

Mr. Conliff. I object to that.

The Court. Yes, sustained.

Mr. O'Connell. Exception.

I would like to read what I have offered in evidence into the record at this time.

Mr. Conliff. I object to the reading.

Mr. O'Connell. It was offered in evidence.

Mr. Conliff. It is irrelevant.

The Court. I haven't ruled on it.

Mr. O'Connell. It has been received in evidence.

Mr. Conliff. What?

Mr. O'Connell. It was received in evidence and no objection made to its offer.

The Court. But he makes an objection now.

Mr. O'Connell. But he is too late. He did not object when it was offered. Does your Honor now exclude this paper? You assumed that this is the Asheville paper of Tuesday, September 12, 1939.

The Court. Yes. My rule is not based on the failure to prove. I understand that it is conceded to be the paper

that you claim it is, but I am ruling as to the relevancy or the admissibility of the paper itself.

111 Mr. O'Connell. I want to put into the record the contents of this newspaper article which your Honor ruled has no relevancy and cannot be admitted. I want the record to show what I offered.

Mr. Conliff. I object to it in evidence.

Mr. O'Connell. I have the right to show what I wanted to show.

The Court. It is not admitted.

(Petitioner's Exhibit No. 4 for identification is as follows:

"Representative Dies Strikes Back At Silver Shirt Chief.

"Seeks to have suspended term against Pelley put into effect.

"Washington, Sept. 11.—Chairman Martin Dies (D. Tex.) of the house committee investigating un-American activities, will move to have a suspended prison sentence, pending in North Carolina against William Dudley Pelley, put into effect, he declared today.

"The announcement came as a sequel to Pelley's suit, filed Saturday in federal district court here, seeking $3,150,000 damages from Dies, members of his committee, and a committee investigator. Pelley maintains headquarters in Asheville as chief of the Silver Shirts, an organization the Dies committee has been investigating.

"Dies first greeted news of the suit with apparent indifference, but following receipt of information from his congressional district in Texas that Pelley allegedly

112 has been conducting an extensive propaganda campaign against him, the Texan hit back.

"Pelley was convicted in superior court in Asheville of violation of the state capital issues law, and sentenced to from one to two years in prison. The sentence, imposed Feb. 18, 1935, was suspended for a period of five years, on payment of a fine of $1,000 and the costs amounting to $719.50. It is this sentence, which was suspended on condition of good behavior for the five-year period, that Dies would have put into effect.

"Dies said he would get in touch with the solicitor of the Asheville district immediately, and request him to ask the court to put the sentence into effect.

" 'If this fails', the Texas congressman declared, 'I intend to have criminal libel action brought against Pelley by the authorities in the second Texas congressional district, and I may even sue him myself.'

"Advised of Pamphlets.

"Dies said he had received several telegrams about pamphlets Pelley is alleged to be circulating in the Texan's district, pamphlets he believes are aimed at defeating him should he run for reelection to congress.

"He said he would base the libel actions on the 'underground propaganda campaign' he charges is being carried on by Pelley in his district. Dies said the campaign, apparently backed by a large amount of money, attacks both him and his committee. I have evidence that one business man in Houston ordered 5,000 of these pamphlets.'

113 "Pelley's suit against Dies and other members of the house committee is based on allegations made by committee members during the recent investigation of Pelley and his Silver Shirts. The committee, made an unsuccessful search for the Asheville publisher, in order to subpoena him before it.

"Solicitor Robert M. Wells, of the nineteenth North Carolina judicial district, last night said he had received no request from Rep. Martin Dies that a suspended sentence pending against William Dudley Pelley be put into effect."

Mr. O'Connell. I now ask to have marked as petitioner's exhibit number 5 the Asheville "Citizen" of October 21, 1939.

(Newspaper, the Asheville "Citizen", October 21, 1939, was marked petitioner's exhibit 5 for identification.)

Mr. O'Connell. I now offer this in evidence where in states that the Dies group sent an investigator "today to assist" in this illegal search order, issued by Judge Nettles, of October 19, 1939.

Mr. Conliff. I object to that.

The Court. You admit that is the paper he claimed?

Mr. Conliff. It is that paper, but what is contained is absolutely irrelevant to this proceeding.

The Court. Sustained.

Mr. O'Connell. This contains a statement as to the files opened behind closed doors to the investigator for the Dies Committee, and that they viewed these different ex-
114 hibits which were illegally seized in violation of the State and Constitutional rights of Pelley.

The Court. I sustain the objection.

Mr. O'Connell. We offer to show that this is not a public, bona fide, legitimate prosecution, and we offer for the purpose of showing that this paper and ask that the reporter incorporate in the record what is contained in petitioner's exhibit number 5, that the "Dies group sends investigator here for Pelley probe."

"Dies Group Sends Investigator Here for Pelley Probe.

"Comes here by airplane for brief conference with authorities.

"Files examined by prosecutor.

"Tax collector attaches printing equipment in Biltmore plant.

"The Dies committee investigating un-American activities sent a representative here from Washington yesterday by airplane as Buncombe county superior court authorities began examining behind locked doors records of William Dudley Pelley confiscated Thursday under a court order.

"Attendants at the Asheville-Hendersonville airport said a government plane landed at the field late yesterday afternoon and took off for Washington approximately an hour and a half later.

"From other sources it was learned Robert Barker, Dies committee investigator, conferred briefly with officials in the courthouse and then returned to Washington.

" 'Not Ready to Discuss Purpose'.

115 "Chairman Dies of the house investigating committee announced in Washington that an investigator had been dispatched to Asheville 'for a purpose we are not ready to discuss yet.'

"It was indicated in Washington, according to an Associated Press dispatch, that the agent was sent here in con-

nection with an investigation of Pelley, who has been the object of a committee search.

"In superior court here Judge Zeb V. Nettles, who issued a capias Thursday for Pelley's arrest and then signed an order directing Sheriff Brown to seize any records that might be used as evidence, placed his name on a second order yesterday appointing Robert R. Williams and Thomas J. Harkins to represent the state in the matter.

"This was done to avoid embarrassing Solicitor Robert M. Wells who served on Mr. Pelley's defense counsel when the Silver Shirt leader was convicted in Buncombe county superior court in 1935 of violating blue sky laws and making fraudulent representations.

"Williams Examines Records.

"Pelley is under a suspended sentence in one of these cases, and judgment has never been entered in the second. It is on the latter that the state is expected to act when Pelley is apprehended.

"Meanwhile at the courthouse Mr. Williams began examining the voluminous files and records of Pelley publishers. These were seized at Pelley's headquarters in the old Asheville-Oteen bank building at Biltmore.

116 "Upon reports that a truck was seen removing furnishings from the publishing house late Thursday night, Tax Collector William A. Swain, Jr. yesterday attached all printing equipment in the plant.

"Mr. Swain explained that the machinery is listed for taxes under the name of Mrs. M. Helen Pelley and that there is approximately $275 due in taxes on it.

"According to the levy made by Mr. Swain, the equipment will be sold at auction on November 3 unless taxes are paid by that time.

"Owes Back Taxes.

"Mr. Pelley, Mr. Swain said, owes back taxes on personal property valued at approximately $5,000. He said he had levied on this property also, but was unable to locate it yesterday. He pointed out that the listing was made by the board of tax supervision in bulk, after Mr. Pelley did not list his taxes.

"The levy was made by Mr. Swain upon the advice of the county attorney after the tax collector's office had

been informed some property was being removed from the Pelley building.

"While Mr. Williams was going through documents, records, correspondence files, publications and other material seized under the court order, sheriff's deputies were continuing a search for Pelley himself."

By Mr. O'Connell:

Q. Did you ever talk to Solicitor Wells about this case since your appointment as special prosecutor?

117 Mr. Conliff. I object to that.

The Court. Sustained.

Mr. O'Connell. Exception.

Will your Honor bear with me a moment?

The Court. I think we might take time for lunch.

Mr. O'Connell. Yes.

The Court. Until half-past one.

Mr. O'Connell. Yes.

(Thereupon, at 12:35 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

118 *After Recess*

(The proceedings were resumed at 1:30 o'clock p. m. at the expiration of the recess.)

The Court. Proceed.

Mr. O'Connell. I believe that through inadvertence this morning when Mr. Pelley was on the witness stand, I produced this clipping from the Cincinnati Inquirer, which was offered in evidence, and on objection was sustained, and I believe that in the exhibits we skipped number 2, so this will be number 2.

The Court. Take whatever number you wish.

Mr. O'Connell. I will keep number 2 so that the exhibits are in chronological order and I will have the reporter number this as petitioner's exhibit number 2.

(Newspaper clipping was marked petitioner's exhibit No. 2 for identification.)

Petitioner's Exhibit No. 2 for identification is as follows:

"Head of Silver Shirts is Cited to Court

"Asheville, N. C., Oct. 19—(AP)—

"William Dudley Pelley, head of the Silver Shirts of America, was cited today to appear in Superior Court here on charges of violating the conditions of two suspended sentences, including allegations that he had 'consorted with known enemies of American institutions,' distributing publicity aimed at the 'overthrow of our government,' and 'leveled disgusting epithets at the office of the President of the United States.'

"Superior Court Judge Zeb Nettles issued a
119 capias ordering that Pelley be taken in custody and required to give $10,000 bond for his appearance at the November term of court.

"Nettles explained that he did not direct that the Silver Shirt chieftain be brought before him immediately because he was solicitor when Pelley was convicted in 1935 on charges of violating the state 'blue sky' law and of fraudulent misrepresentation in connection with the operations of Galahad College and the Galahad Press, both enterprises under Pelley's control.

"On the 'blue sky' charge, Pelley was sentenced to pay a fine of $1,000, and to serve one to two years in prison, suspended upon ciditions that he refrain from the alleged illegal activities, and upon the second charge prayer for judgment was continued upon condition that he conduct himself properly.

"Another allegation made in the Judge's order today was that there were 'many reasons' to indicate Pelley was being financed by 'foreign and un-American sources.'

"The Dies Committee, investigating un-American activities, recently sought to bring Pelley before it to answer questions about his Silver Shirts organization and other activities but the committee representatives reported they were unable to find him and serve a subpoena upon him."

Thereupon **Robert R. Williams** the witness under examination at the time of taking the recess, resumed the
120 witness stand and was examined and testified further as follows:

Direct Examination *continued

By Mr. O'Connell:

Q. I will ask Mr. Williams whether he was in court on the day that Judge Nettles issued his capias for Mr. Pelley. A. I was not, no, sir.

Q. I will ask you whether you conferred with Judge Nettles after your appointment as special prosecutor.

Mr. Conliff. I object.

The Court. I do not see the relevancy of it.

Mr. O'Connell. I intend to show that this man, without a hearing and in violation of the law, has been condemned.

The Court. I am ruling. I sustain the objection.

Mr. O'Connell. Exception.

I offer for identification petitioner's exhibit number 6.

(Newspaper "The Asheville Times", Thursday, October 19, 1939, was marked petitioner's exhibit No. 6 for identification.)

The Court. I suppose that is a copy of the paper it purports to be.

Mr. O'Connell. It is conceded that this is a copy of "Asheville Times" of Thursday, October 19, 1939.

I offer this in evidence, and I take it there is objection?

Mr. Conliff. Yes, the same objection.

Mr. O'Connell. I note an exception—

The Court. The same ruling.

Mr. O'Connell. (Continuing) —to your ruling.

Now, I ask the reporter for the purpose of the
121 record to incorporate into the record what is contained in this paper, offered in evidence, and refused.

The Court. May I suggest that you mark it as an exhibit for identification?

Mr. O'Connell. Rather than have newspapers go up to the Court of Appeals, I would rather have it in the record so that we can know what we have, and I ask the reporter to incorporate in the record the complete story of the issuance of the capias, the statement of Judge Nettles, his announcement and so forth.

Mr. Conliff. My objection still goes.

(Petitioner's exhibit No. 6 for identification is as follows:

"Capias issued for Pelley's Arrest.

"Nettles Orders Sheriff to Seek Silver Shirter.

"Judge Announces Plan to Place Pelley Under $10,000 Bond.

"Raps His 'Propaganda'.

"Says Defendant Has 'Broken Promises' Made to Court In 1935.

"A capias was issued in Boncombe county superior court today for the arrest of William Dudley Pelley, self-styled chieftain of the Silver Shirts legion.

"Judge Zeb V. Nettles, presiding, ordered the court clerk to issue the capias just prior to noon today. At the same time, Judge Nettles read a prepared statement setting forth that Pelley's 'breaking of promises' made at the time he was convicted in superior court here in 1935 prompted the issuance of the capias.

122 "Judge Nettles also cited Pelley's engaging in 'practices and propaganda which deserve the severe condemnation of all good American citizens.'

"Search Skyland Press.

"The capias was promptly turned over to the sheriff's department and deputies sheriff were sent to Pelley's Skyland Press and Silver Shirts headquarters at Biltmore to make the arrest. The deputies searched the building, and failing to find Pelley, informed his secretary that Pelley or his attorney was directed to get in touch with Sheriff Laurence E. Brown or the sheriff will take 'further action.'

"It was understood that the whereabouts of Pelley was not revealed at his headquarters, the former Biltmore-Oteen bank building which he purchased some time ago.

"The judge directed Sheriff Brown to make every effort to apprehend Pelley and bring him into court in order that Pelley could be placed under a bond of $10,000 for his appearance before Judge Judge J. A. Rousseau at the November term of superior court.

"Convicted in 1935.

"Pelley, whose activities with the Silver Shirts have been in the spotlight of the Dies committee's investigations of un-American activities recently, was convicted in the

superior court on two 'distinct felonies' at the February term in 1935. One was violation of the blue sky laws and the other was a crime 'involving high moral turpitude,
namely, that of making fraudulent representations,'
123 Judge Nettles pointed out in court today.

"Pelley was sentenced for from one to two years in State's prison on the blue sky law violation, and the prison sentence was suspended by Judge Wilson Warlick, presiding, on payment of a fine of $1,000 and the costs upon condition the defendant 'be and remain continuously on good behavior.'

"On the conviction for fraudulent representations, Judge Nettles pointed out, prayer for judgment was continued for five years.

"Both Pelley and an associate, Robert C. Summerville, were convicted on two counts in the 1935 trial. Among the conditions on which the prison sentences were suspended was the condition that Pelley make immediate payment of the $1,000 fine and costs of the trial, which totaled $719.50.

"Other Conditions.

"The prison term of Pelley was suspended on the following other conditions:

"1. That he continue of good behavior for a five-year period.

"2. That he not publish or distribute in North Carolina any periodical, and particularly anything that has to do with stock sale transactions or reports of corporations. Similar conditions were imposed on Summerville.

"Sometime later, 1936, Pelley announced his candidacy
for president of the United States on a platform of
124 'For Christ and the Constitution.'

"It was in 1928 at Pasadena, California, that Mr. Pelley says he had an experience which changed his life. At the time, Pelley allegedly 'died.' He was supposed to have remained dead for only 'seven to 10 minutes' and then returned to earthly existence. This incident in Pelley's life won him wide notoriety.

"It was understood that an attorney named Hatfield from Washington, D. C., was in Asheville to represent Pelley in the current action by Superior Court Judge Nettles.

An Asheville attorney went to the Sheriff's department today to obtain a copy of Judge Nettles. An Asheville attorney went to the sheriff's department today to obtain a copy of Judge Nettles' statement read in court just before noon, explaining that the copy was desired by the Mr. Hatfield, who was an attorney for Mr. Pelley.

"Weaver Asked Probe.

"Mr. Pelley's name has been associated with a number of developments in Washington (D. C.) news in recent months. In August, Representative Zebulon Weaver of this district of North Carolina moved for a congressional investigation of Pelley's activities, charging that Pelley was 'stirring up unrest among Indians' on the Cherokee reservation in Western North Carolina.

"A subpoena for Pelley was issued by the Dies committee in connection with its investigation of his Silver Shirts interests, but the man was not located. The Dies committee sought to have Pelley testify regarding al-
125 leged efforts of the Silver Shirts to 'sabotage' the work of the committee.

" 'Broken Promises.'

" 'Since these convictions,' Judge Nettles said, 'this court has been informed Pelley has not only broken the promises which he made to the court, but has engaged in practices and propaganda which deserve the severe condemnation of all good American citizens. He has continued to prey upon and collect money from credulous neurotic people to his own enrichment by appealing to their basest religion, moral, racial and social prejudices. He has attempted to reap financial profit by engaging in every possible form of un-American activities. He has leveled disgusting epithets against the office of the president of the United States. He has consorted with known enemies of American institutions. There are many reasons to believe that he is being paid from foreign and un-American sources.'

"In ordering the clerk to issue the capias for Pelley's arrest, Judge Nettles requested Robert R. Williams and Thomas J. Harkins, leading attorneys here, to present the matter whenever Pelley is brought into the court. This was done, the judge pointed out, in order not to 'em-

barrass' Solicitor Robert M. Wells, who, in 1935, was a member of the defense counsel for Pelley during his trial.

"Test of Statement.

"The prepared statement read by Judge Nettles at the time he ordered the capias issued for Pelley is as
126 follows:

" 'At the February term, 1935, W. D. Pelley was convicted in this court for two distinct felonies, one for violating the Blue Sky laws, and the other for a crime involving high moral turpitude, namely, that of making fraudulent representations. At that time information came to the attention of the court that Pelley was collecting sums of money from credulous people by playing upon their religious, racial and social prejudices and fears. It was suggested even at that time that he was being paid for his propaganda by sinister foreign sources. He pleaded for mercy and promised to lead a decent life.

" 'Pelley was sentenced for one to two years in the state's prison on one of these convictions, but on account of these assurances, Judge (Wilson) Warlick, a humane and just judge, suspended the prison sentence for five years upon payment of a fine of $1,000 and costs and upon condition that the defendant 'be and remain continuously on good behavior.'

" 'On the conviction for fraudulent representations, prayer for judgment was continued for five years.

" 'Deserves Condemnation.

" 'Since these convictions, this court has been informed Pelley has not only broken the promises which he made to the court, but has engaged in practices and propaganda which deserve the severe condemnation of all good American citizens. He has continued to prey upon and collect money from credulous neurotic people to his
127 own enrichment by appealing to their basest religious, moral, racial and social prejudices. He has attempted to reap financial profit by engaging in every possible form of un-American activities. He has leveled disgusting epithets against the office of the President of the United States. He has consorted with known enemies of American institutions. There are many reasons to believe that he is being paid from foreign and un-American sources. He is now said to be conducting his nefarious

practices from some secret hiding place; made afraid by his knowledge of his own wicked misdeeds, to face in public his fellow American citizens.

"Enjoys Laws' Protection.

" 'Here is a man enjoying the protection of our laws. He has deliberately violated our laws against crime. He is a felon. Such conduct on his part would in the country he professes to ape, admire, love and respect, forfeit his life. He deals in accusations, loud boastings, preens his feathers like a peacock and struts upon the stage of life, falsifying facts and hurling accusations. In his desperation to gain attention and occupy the spotlight, he has even accused our great President of high crimes and misdemeanors. He professes to be a friend of the American people and at the same time advocates class, racial and religious hatred.

" 'It is not those, Mr. Solicitor, from without that we must watch, but those so-called saviours of mankind who are preaching a doctrine deadly to American institutions.

This defendant who has been moving in our midst
128 seeking to further the cause of Naziism with himself
as the dictator, seeking to destroy justice and liberty and abolish all laws, living under the very protection of that law, he is seeking to overthrow and trying to undermine our system of government. Such a man cannot deserve the blessings of a government like ours. He is a menace to our society. Gratitude is one of the most beautiful attributes of human character. This man 'smites' the hand that feeds him and has the unenviable record and distinction of being a contemptible ingrate.

" 'Helped Unravel Course.'

" 'We do not have to defend our system of government from a character or individual. For three weeks I sat here in this very courtroom and helped unravel a course of crooked dealing, thievery and stealing sufficient to damn any man, much less this contemptible seeker after notoriety, W. D. Pelley, so-called and self-styled leader of the Silver Shirts, convicted felon, not now even a citizen of our country. A Buncombe county jury says he is not, yet he would be our dictator and would tell our country what to do.

" 'We have diffused in this great land of ours well-being among the whole population to an extent without parallel

in any other country in the world. We have furthered peace-keeping, peace-loving, among our peoples; we have set a splendid example of the broadest religious toleration and freedom, and we have welcomed newcomers from all
parts of the earth and have proved that they are
129 fit for political freedom. These are some of the
practical things we have accomplished in this great nation of ours. They are the triumphs of reason, enterprise, courage, faith and justice over passion, selfishness, inertness, timidity and distrust.

" 'Man's Work To Do.'

" 'In these days of trouble and of daily national emergencies, there is a great comfort in the thoughts and recollection of Washington, Jefferson, Jackson, Lincoln, Wilson and hundreds of other great Americans who gave their lives that our country might live. The zeal of justice, of learning and humanity lies deep in the American heart. Whenever a man tries to tear down the institutions of this great democracy by boring from within, Mr. Solicitor, then I say that we should be on our guard and get to work. It is well to be a gentleman and a scholar, but after all it is better to be a man ready to do a man's work and face the practical things of life.

" 'We have a man's work to do in making democracy work here in this nation of ours; to preserve its institutions, its freedom, its Christianity, is men's work. We must preserve and obey our laws. We must enforce our laws. We must be tolerant. We must be religious. We must do our utmost to carry on where our fathers and mothers left off in order to hand down to our children a better citizenship, but eternal vigilance is the price of liberty.

" 'Owes Debt To Society.'

" 'W. D. Pelley has set up in our midst a printing
130 press and is sending out to the country at large
messages devoted to bigotry, class and racial hatred, religious intolerance, with the end in view of overthrowing our government. He owes a debt to society, Mr. Solicitor, for his criminal conduct, having been heretofore convicted of two felonies in this country.

" 'I direct you, Mr. Clerk, to issue a capias for the arrest of this man and have him brought before this court, Mr.

Sheriff, to be dealt with under the law and justice. Mr. Sheriff, I hope that you will make every effort to apprehend this man and bring him before this court in order that he may make a bond in the sum of $10,000 for his appearance before Judge (J. A.) Rousseau at the November term of this court.

" 'Mr. Solicitor, I would not want to embarrass you at all in this matter and on account of your connection with the case, I will request Mr. R. R. Williams and Thomas J. Harkins to present the matter whenever he is brought before the court.'

"Judge Nettles expressed the opinion that any action of the court would be based on the second count, in which prayer for judgment was continued for five years. He said he regarded the other count as finally disposed of with the payment of the fine and costs.

"Attempts of a Times reporter to reach William Dudley Pelley at his headquarters in Biltmore today were unsuccessful.

"A reporter telephoned the Skyland Press office of Pelley a short time after the capias for the Silver Shirts
131 leader's arrest had been issued in the superior court. A woman answered the telephone."

Mr. O'Connell. I now ask that this paper be marked petitioner's exhibit number 7.

(Newspaper, The Asheville "Advertiser", Friday, February 23, 1940, was marked petitioner's exhibit 7 for identification.)

Mr. O'Connell. I assume it will be considered that this is a copy of the Asheville "Advertiser".

The Witness. I assume so.

The Court. It is conceded it is a copy.

Mr. O'Connell. It is conceded it is a copy of the Asheville "Advertiser" of Friday, February 23, 1940.

It is offered in evidence, and I take it the same ruling applies to this paper as to the others.

Mr. Conliff. Just for the sake of the record, as I understand it, all these newspaper clippings are being offered as exhibits and my objection is sustained to the contents thereof and all parts of them?

Mr. O'Connell. Yes.

The Court. Yes. Mr. O'Connell is putting them in the record as a part of his record.

Mr. O'Connell. So the Court of Appeals may see what was offered and what was refused.

The Court. Yes.

Mr. O'Connell. I note an exception to your Honor's refusal to admit this.

I ask the reporter to incorporate this in the record,
132 that part of the Asheville "Advertiser" of Friday morning, February 23, 1940, which refers to the prosecutor of Buncombe County, stating that there is no criminal charge pending against Pelley, to his personal knowledge, and that he knews of nothing upon which Pelley may be sent to jail, if brought back to North Carolina.

(Petitioner's exhibit number 7 for identification is as follows:)

"Believes Pelley Will Escape Conviction Here.

"Solicitor Wells Expresses Opinion Evidence Lacking To Convict Leader.

"That the state has insufficient evidence to build up a case against William Dudley Pelley, leader of the Silver Shirts, was the opinion expressed yesterday by Solicitor Robert M. Wells to an Asheville Advertiser representative. Mr. Pelley, who eluded capias servers for several months finally came out of his burrow before the Dies Committee. He is out on $2,500 bond for a hearing in Asheville on March 12.

"Solicitor Wells pointed out that the Federal government had no damaging facts to hold Mr. Pelley on and predicted that he would be freed here unless the state has evidence of which he is now ignorant.

"It is contended on one hand that Mr. Pelley's recent activities have violated provisions of a suspended sentence, while contrary opinion points out that Buncombe County has no case, as the Silver Shirt leader was not held for Federal violations. Several years ago, before
133 holding an elective office, Solicitor Wells represented Mr. Pelley in a legal capacity."

By Mr. O'Connell:

Q. Now, I ask the witness whether he has had conferences with Mr. Wells since the issuance of the capias on October 19, 1939.

Mr. Conliff. I object.

The Court. The same ruling.

Mr. O'Connell. Exception.

By Mr. O'Connell:

Q. Were you present when Mr. Harkins was asked at the time of the taking of the deposition by order of the court in Asheville, when Mr. Harkins was asked as to the source of his income and he refused to tell the same? A. That record speaks for itself.

Q. I am asking you, were you present? A. I was present during part of Mr. Harkins' questioning.

Q. Did you hear him asked that question and refuse to answer? A. I don't just recall what question was asked and what Mr. Harkins' answer was. I don't like to say because the record is there.

Q. Let me see if I can refresh your recollection. See if you can remember if you heard this question.

I am referring to page 67 of the deposition, and the question is as follows:

"Now, do you recall, Mr. Harkins, who paid your fees in that matter?

134 " 'There was an objection by the respondent, and then there was the answer:'

"That is a matter that does not concern this hearing whatever."

Did you hear that question and that answer? A. I recall a question somewhat similar to that. That may have been the exact question. I know Mr. Harkins also said that the Judge when he went into the matter was thoroughly satisfied at the time.

Q. That matter was brought up at the original hearing on Pelley? A. Yes.

Q. You were both asked as to your previous testimony.

Mr. Conliff. I object to any question relative to that.

Mr. O'Connell. That is a matter of record that was gone into and the Court then refused to admit that.

The Witness. And the Court was entirely satisfied with the situation and stated so.

By Mr. O'Connell:

Q. How long have you been a member of the bar of North Carolina? A. Since September, 1904.

Q. You are familiar with the criminal law of North Carolina, are you not? A. In a general way.

Q. Now, I will ask you whether or not the North Carolina law provides for a special prosecutor appearing in any case.

Mr. Conliff. I object to that question. It is not
135 relevant.

Mr. O'Connell. It is most germane. We have a right to go into that. We have a right to inquire how they got in there.

Mr. Conliff. I don't think that is before this Court. Mr. Williams has no part in this hearing.

Mr. O'Connell. He is a special prosecutor.

Mr. Conliff. Even so.

Mr. O'Connell. You do not object to him stating what the law provides, if the law provides that. If that is the law, we can find that out.

Mr. Conliff. I think it is irrelevant.

Mr. O'Connell. The law of North Carolina has to be controlling.

The Court. I sustain the objection.

Mr. O'Connell. I note an exception.

By Mr. O'Connell:

Q. You were present when Judge Nettles was examined? A. Yes, I heard Judge Nettles' deposition taken.

Q. You heard his whole deposition? A. Yes, I think I heard his whole deposition taken.

Q. Judge Nettles is a very capable lawyer, is he not? A. Yes.

Q. Do you recall this question being asked:

"Did you ever consult with them at the time or before you were prosecuting this case?

" 'The persons referred to are: Kartus, Williams, Harkins, and George Anderson.

Mr. Conliff. What page is that?

136 Mr. O'Connell. Page 11.

His answer is, "I expect I have."

"Question. Regarding the Pelley case?

"Answer. I expect so. I asked both of them to assist me in the trial of the case because they were familiar with the transactions, and under the laws of North Carolina we are not provided any help, but we have to do the best we can in the prosecution of cases."

Do you recall that answer of Judge Nettles?

Mr. Conliff. I also would like to object to this, because at the time these depositions were taken counsel for the respondent objected. There is one in the record, and I want to renew the objection.

The Court. I do not understand the purpose of asking this witness that.

Mr. Conliff. I think the deposition speaks for itself.

Mr. O'Connell. They say the deposition speaks for itself and "I stand on the record", but he can tell us whether it was legal for him and Mr. Harkins to appear in this case as prosecutors.

The Court. If that is what you want to know, I have already ruled on the question, that what the law of North Carolina provides on that matter is not relevant here, and I sustain the objection.

Mr. O'Connell. I urge on the Court that this is part of our allegation that this is a private prosecution for ulterior purposes.

By Mr. O'Connell:

Q. You were present in Court when judgment was

137 passed on Pelley? A. Yes.

Q. Can you tell us what fine Pelley paid or costs Pelley paid?

The Court. You have the judgment.

Mr. O'Connell. The judgment does not say what amount that cost was.

By Mr. O'Connell:

Q. He paid a thousand dollar fine, didn't he? A. It is my recollection he paid a one thousand dollar fine, showing every consent to this judgment at the time.

Q. Don't go into extraneous matters.

The Court. The answer may be stricken.

Mr. O'Connell. It shows he was fined but it does not show he paid it. I want to show he complied with that part of the judgment.

By Mr. O'Connell:

Q. Do you know he paid a thousand dollar fine and costs of almost $800? Do you know that? A. It is my—I think he paid a fine and the costs. That is my distinct recollection, but the record speaks for itself.

Q. Can you show any record that indicates that in these papers?

The Court. I thought the papers did indicate that.

Mr. O'Connell. They do not indicate that.

Mr. Conliff. The records indicate what the sentence was.

Mr. O'Connell. They do not indicate—

The Court. (Interposing) Can you tell us what the fine and costs were?

138 Mr. O'Connell. We will stipulate a one thousand dollar fine and almost eight hundred dollars in costs was paid on the first count.

Mr. Conliff. Yes, that is my understanding.

By Mr. O'Connell:

Q. I will ask the prosecutor if he will stipulate that as a condition of the suspension of the sentence on the first count that it was suspended on the condition that the fine and costs be paid. Is that correct?

Mr. Conliff. That is included in the record.

Mr. O'Connell. Do you stipulate that?

Mr. Conliff. There were certain conditions attached to the suspension of the sentence.

Mr. O'Connell. One of them was that the fine and the costs be paid.

Mr. Conliff. One of them was the fine and the costs, and two other conditions.

By Mr. O'Connell:

Q. The costs of the Court of eight hundred dollars were not restricted to any first count charge, were they?

Mr. Conliff. I object.

A. I don't know.

The Court. That depends on the record.

Mr. O'Connell. It is not in the record. We can show he complied with the conditions. There is no statement in there that he paid the fine and the costs. There was a statement that he was sentenced to pay them.

Mr. Conliff. I do not believe there is any entry in these papers of the Court showing the fine was paid.

139 Mr. O'Connell. I charge that that paper was in there and that it has been removed.

The Court. Does the record show that the sentence from one to two years—

Mr. Conliff (interposing). That is correct.

The Court (continuing). —was imposed on count one and then suspended on condition that he pay this fine?

Mr. O'Connell. And costs.

The Court. On count number two against the defendant Pelley there was prayer for judgment continued for five years.

Mr. O'Connell. The purpose of my question was to show that the petitioner Pelley paid the costs of the whole proceeding which was estimated at a little below eight hundred dollars.

The Court. I would say that is correct, from your understanding, but I do not know whether there is any contention to the contrary.

Mr. Conliff. No, I do not think there is any dispute, but I think it is immaterial whether it was paid or not, for the purpose of this proceeding.

By Mr. O'Connell:

Q. Were you present in Washington when Mr. Pelley was arrested?

Mr. Conliff. I object to that.

The Court. Objection sustained.

Mr. O'Connell. At this time I would like to ask your Honor to withhold ruling on that because I intend to show your Honor the circumstances.

This arrest in this case was absolutely unconstitu-

140 tional and illegal in that the petitioner Pelley was present under the dome of the United States Capitol in response to a subpoena issued by the authority of the

House of Representatives for him to be there, and while in attendance in that building in response to that subpoena he was placed under arrest in this proceeding.

I say it was unwarranted and that is one of the reasons why this proceeding should be dismissed and the petitioner released.

The Court. What do you propose to show?

Mr. O'Connell. I propose to show that he was seized, arrested in violation of his constitutional rights in that he was arrested when they had no right to arrest him.

The Court. I want the facts. You say he was here in response to a subpoena. What subpoena?

Mr. O'Connell. Of the Dies Committee, and he was on the witness stand.

The Court. Had he been discharged from that Committee?

Mr. O'Connell. He was kept there under prolonged questioning while intensive efforts were made to procure a warrant at the police court.

That warrant was once refused by the Assistant District Attorney, and subsequently it was procured. They went before Judge McMahon who refused to issue it. They sent the matter to Judge Curran, who sent it back to Judge McMahon, and Judge McMahon then issued the order.

Meanwhile, the petitioner was kept on the witness stand at the House of Representatives before the Dies Committee. When the warrant was procured, the represen-
141 tative of the police department walked up and stood beside Pelley, even though they knew that he was there in response to a subpoena to appear before this Committee and while he was on the witness stand under the United States Capitol dome, they said, "We now release you from your subpoena to appear before this Committee." That is where Pelley was arrested, and we say we have a right to go into that.

The Court. Have you any authorities? Where was the subpoena served?

Mr. O'Connell. Does your Honor need authorities on such a fundamental question?

The Court. I am sorry to say I do. Where was the subpoena served on him?

Mr. O'Connell. Right in the Dies Committee room.

The Court. The subpoena to appear before the Committee, I mean.

Mr. O'Connell. It was handed to Mr. Pelley in Congressman Dies' office at the Capitol.

The Court. To appear before the Committee, you mean?

Mr. O'Connell. Yes.

The Court. What is your authority?

Mr. O'Connell. It is fundamental that a witness appearing in the Capitol in response to a subpoena is immune to service in any legal process, isn't it?

The Court. Perhaps you can find some authority for it.

Mr. O'Connell. Yes. May we pass it for the time being, however?

The Court. I would rather know the law first, if you are going into the testimony.

142 Mr. O'Connell. This is the case of Wilder against Walsh, 1 McArthur 566.

"The privilege of a witness in attendance upon a Congressional Committee is not higher than that of a member of Congress; he may, therefore, be served with a summons as defendant in a suit in this Court.

"This was a motion to set aside the service of a summons upon the ground that the defendant in the suit, when the service was made upon him, was a witness from one of the States in attendance upon a Congressional Committee under a subpoena; and was, therefore, exempt from process while in attendance, and in coming and returning from the city. The Court unanimously held that the privilege of a witness before Congress, or before any of its Committees, stands on the same footing as the privilege of the members of that body, and that this does not extend to freedom from the service of a simple summons, but only from arrest."

Now, that is clear language, and that is part of what we say is this conspiracy to trap Pelley. There is no criminal charge pending against Pelley upon which they seek to impose this sentence, and the five years for which that sentence was suspended has elapsed, and I ask under the authority of that citation to be permitted—

The Court (interposing). What is the authority?

Mr. O'Connell. 1 McArthur, 566.

The Court. Let me read that case.

Mr. O'Connell. Yes. (Handing a book to the Judge.)

143 The Court. Do you have any other authority?

Mr. O'Connell. I do not think any other authority should be necessary. I have no other.

The Court. This opinion does not quote any authority. The effect is to hold that a summons in a civil proceeding—

Mr. O'Connell. I beg your pardon.

The Court. That a witness is not immune from a summons in a civil proceeding.

Mr. O'Connell. But doesn't it amount to keeping him here by trickery and entirely beside the legitimate functions of the Committee?

The Court. You said he was here appearing before a Congressional Committee and arrested while he was in the Capitol?

Mr. O'Connell. Yes.

The Court. You mean he came here from some place else?

Mr. O'Connell. He came here from somewhere else when he was informed that a subpoena had been issued. He came here in response to that issuance of the subpoena.

The Court. Where did he come from?

Mr. O'Connell. Where did you come from to Washington?

Mr. Pelley. Chattanooga, Tennessee.

Mr. O'Connell. He came here and expected to be in the Dies Committee hearing.

The Court. Well, I should think, Mr. O'Connell, that the privilege of a witness would be analogous to the privilege of a witness attending before a Court.

Mr. O'Connell. I beg your pardon.

The Court. The privilege of a witness attending

144 before a Committee would be analogous to the privilege of a witness attending before the Court, and my understanding of the authority is that he is not privileged from arrest for an offense.

Mr. O'Connell. The Court held that the privilege of a witness in attendance upon a Congressional Committee is not higher than that of a member of Congress and that the privilege of a witness before a Committee does not extend

to freedom from the service of a simple summons in a civil proceeding but does to arrest.

Mr. Conliff. Will you hear me on that proposition, your Honor?

The Court. Yes.

Mr. Conliff. I have a definite case on the subject from the Supreme Court of the United States.

The Court. This is a very short case.

Mr. Conliff. That case in substance held that a witness before a Congressional Committee was in the same position as a Congressman or Senator.

The Supreme Court in the case of Williamson versus United States, 207 U. S., 245, 1908, in that case the Court discussed the historical background of this clause of the Constitution, Article 1, Section 6, Clause 1, which states:

"They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

The Court discussed that at some length and the English rule, and at page 446 of the opinion said:

145 "Since from the foregoing it follows that the term 'treason, felony, and breach of the peace,' as used in the constitutional provision relied upon excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit, and we are thus brought to consider the other assignments of error relied upon."

The Court. What case is that?

Mr. Conliff. That is the case of Williamson versus United States, 207 U. S., 425.

The Court. Was that a criminal prosecution of California origin?

Mr. Conliff. My notation is that Williamson, while a member of the House of Representatives, was indicted with two others for conspiracy to commit subornation of perjury. He was found guilty.

When the Court was about to pronounce sentence in 1905, Williamson's term did not expire until 1907. He pro-

tested on the basis of Article 1, Section 6, Clause 1, of the Constitution.

Mr. O'Connell. Was he under subpoena?

The Court. He was a defendant.

Mr. O'Connell. Was he subpoenaed?

The Court. He was a member of Congress. The question is, what were his privileges?

Do you have any other authorities?

Mr. Conliff. In the case of People ex rel Hower
146 versus Foote, 223 New York State, 681, the Court held that the "doctrine of immunity from arrest does not apply in criminal cases."

I have other cases, and this case of Wilder against Walsh was decided in 1874, which Mr. O'Connell quoted, and that merely means that a witness appearing before Congress stands on the same footing as a member of Congress, and in that case they held that the privilege does extend to freedom from the service of a simple summons.

The Court. Apparently this means that the privilege is limited to a civil arrest and not to criminal cases.

Mr. O'Connell. I say that the rule is even more strict in bringing witnesses to appear before Congressional Committees, because a Congressman is there in the ordinary course of business while a witness is appearing through the issuance of a subpoena.

When we connect up the facts in this case that Dies issued a statement that he was going to have this suspended sentence lifted and the sentence imposed and with the arrest right in the Dies Committee room, and the fact that Dies made a statement that he was going to have this sentence imposed, and the fact that the judge issued a capias order which says he has already been found guilty, connected with the fact that, as we have offered to show, the investigator was sent by the Dies Committee down there to go over all this evidence, which was seized by order of the Court without a search warrant, from the premises of Pelley, all that goes to show this conspiracy, connected with the fact of the statement which just appeared in the papers recently that Pelley was going to seize the property of the Government, if you recall it. That was all part
147 of this conspiracy. That was done to prejudice this Court against Pelley.

The Court. I did not read it.

Mr. O'Connell. It came out of the Dies Committee, and I think that this was part of the conspiracy, and I urge upon your Honor to consider this.

The Court. Let us dispose of this question of the privilege of the witness. Is there anything more you wish to say on it?

Mr. O'Connell. There is nothing more. I will stand on it.

The Court. In this Williamson case, as I understand the law, it is not a defense of the arrested witness, appearing from another jurisdiction, in that the law does not apply to arrest for criminal prosecution even though they are compelled to come. They are immune from civil arrest, however.

Mr. O'Connell. But this case says just the opposite. They may be served with a simple summons but they cannot be arrested.

Mr. Conliff. I think I can answer that.

The Court. Go ahead.

Mr. Conliff. In those times, in 1874, it was possible to arrest a man for nonpayment of debt, and there was such a thing as civil arrest, and I am sure that the Court in that case referred to civil arrest and not to criminal arrest because the decisions are all to the contrary.

However, this Williamson case is a much more recent case.

Mr. O'Connell. If your Honor refuses to permit me to go into that, I will see if I can get better authorities.

148 The Court. I will do whatever you say about it. If you want to take that up later, you may do so.

Mr. O'Connell. Yes, I would like to take it up later.

I would like to ask this witness whether there is any criminal charge pending against Pelley in the State of North Carolina upon which this capias was issued.

The Court. You mean anything other than contained in the file?

Mr. O'Connell. Yes.

The Court. Anything other than contained in the file?

Mr. O'Connell. There is nothing in the file.

The Court. Are you referring to the charge in the file?

Mr. O'Connell. There is no charge in the file. He is not

charged. He is charged with not being on good behavior, and the Supreme Court of the State of North Carolina has defined the term "good behavior".

By Mr. O'Connell:

Q. I ask this witness if the State of North Carolina has defined the term "good behavior".

Mr. Conliff. I object.

The Court. What is the objection?

Mr. Conliff. My objection to this question is that the requisition papers speak for themselves. He has been charged with the crime on which the prayer for judgment was continued.

Mr. O'Connell. He has been tried on that.

Mr. Conliff. And any subsequent crime he may be guilty of.

The Court. I want to know whether he is asking for anything other than in the file, and I want "yes or
149 no". I think, if I misunderstood you—

Mr. O'Connell (interposing). Let me say—

The Court (interposing). Just a minute.

Mr. O'Connell. Very well.

The Court. Can you answer yes or no?

Mr. O'Connell. What do you mean by "other charge"?

The Court. Conviction.

Mr. O'Connell. Yes, I refer to any other charge.

The Court. Let us get this straight. Are you referring to something other than this?

Mr. O'Connell. Yes.

The Court. What does that mean?

Mr. O'Connell. I can get you the authorities. The contention upon which they sent to bring this man back is not for a violation but that they say he is not "of good behavior". I think that will be conceded.

The Court. I assume there is no charge other than the charges growing out of counts one and two.

By the Court:

Q. Is that correct, so far as you know, Mr. Williams? A. I don't know.

The Court. There is nothing else before me.

Mr. O'Connell. I want to put something else before you. This order was arbitrarily issued. The sentence had been suspended for five years, and then—

The Court (interposing). Wait a minute. What is the question?

Mr. O'Connell. The question is whether or not there is any criminal charge pending against Pelley in the
150 State of North Carolina upon which this capias was issued.

The Court. Do you except from that any possibility on counts one and two in the indictment? Do you mean to include counts one and two?

Mr. O'Connell. Anything other than that.

The Court. Then it is irrelevant.

Mr. O'Connell. Well—

The Court (interposing). I am assuming—

Mr. O'Connell (interposing). I think I can be of great help to the Court if you let me show you.

The Court. What does this mean?

Mr. O'Connell. You can't order him back to North Carolina unless there is another charge.

The Court. I can't?

Mr. O'Connell. If I show you there is no other criminal charge against him.

The Court. I think the question is not pertinent. I sustain the objection.

Mr. O'Connell. Would your Honor care to hear the leading case on that question of what constitutes good behavior and a violation of the condition of "good behavior" by the Supreme Court of the State of North Carolina?

The Court. At the proper time, yes.

Mr. O'Connell. I am asking it now to bring out that there is no charge. If I show you that there is no criminal charge pending against him, you can't order him back to North Carolina because in order to lift the suspended sentence, there must be a charge of the violation of the law.

The Court. If you told me there are a dozen other
151 indictments, I could send him back on this.

Mr. Conliff. These are not before you.

Mr. O'Connell. You are confined to the jurisdiction of the Court of North Carolina issuing the capias for him. This man is a special prosecutor, and he can tell us.

The Court. I think the question you have asked is irrelevant.

Mr. O'Connell. Would this Court hear the North Carolina definition of "good behavior"?

The Court. Not now; when we get through with the testimony.

Mr. O'Connell. If I read it to you, you will permit me to ask the question?

The Court. No, I won't. I may misunderstand your position, but I have ruled on this question.

Mr. O'Connell. Your Honor is not concerned with whether or not there is any other charge against him?

The Court. No.

Mr. O'Connell. The answer is "no"?

The Court. I assume there is no other charge.

Mr. O'Connell. You don't have to assume that if you permit the witness to answer the question. He knows whether there is a charge pending or not.

By Mr. O'Connell:

Q. I will ask you, as an experienced lawyer in the State of North Carolina, whether it is the practice of a judge issuing a capias without an affidavit of misbehavior about a person for whom the capias is issued.

(There was no answer.)

152 Mr. O'Connell. That is all.

Mr. Conliff. Just a minute.

Cross Examination

By Mr. Conliff:

Q. Let me ask you this question, Mr. Williams: Were you present in Court at the time Mr. Pelley was sentenced on the indictment mentioned in these requisition papers? A. I was.

Q. Did you read the jusgment imposed by that Court in these requisition papers? A. I did, yes.

Q. Is that the judgment (handing a document to the witness)?

Mr. O'Connell. It is stipulated it is.

By Mr. Conliff:

Q. Is that the judgment, that same judgment that was imposed by the Judge at the time?

Mr. O'Connell. I object to that. We have stipulated it was. That is all I will ask this witness.

(The witness left the stand.)

Mr. O'Connell. I now move to renew my motion that this hearing be continued until the witness Harkins, who was ordered to testify and refused to testify on order of this Court, be ordered to appear in this Court and submit to cross-examination by me as to his refusal to answer.

The Court. Have you finished with all your testimony?

Mr. O'Connell. We have no other witnesses, but I would like to be heard on the law of the case.

The Court. What do you want me to do? Do you
153 want to put to him the same questions that you put to Mr. Williams?

Mr. O'Connell. Yes. With respect to the depositions in this case, I do not know whether they are part of the record. Does your Honor have the original depositions in this case? I received word that they had been filed, but in the event that they have not been filed, I would like to ask the reporter to be permitted to incorporate them. I think you will concede this is a copy of the deposition taken there (indicating).

Mr. Conliff. Yes.

Mr. O'Connell. And may the reporter incorporate the deposition taken from the witnesses in this case at Asheville, North Carolina? These depositions were taken as a result of notice served and authorization by the Court to take them.

Mr. Conliff. I think the original should be incorporated in the record. I have what purports to be a copy.

Mr. O'Connell. Is it agreed in the event the original is not here, that either Mr. Conliff's or mine may be incorporated by the reporter and made a part of the record?

The Court. If you agree this deposition may be received. I don't know whether there are many objections on that.

Mr. Conliff. Yes. The depositions are with objections. They are similar to the questions put to Mr. Williams on the stand.

Mr. O'Connell. But no answers were made.

Mr. Conliff. That is true.

Mr. O'Connell. Is it agreed that if the original is not here we may incorporate that into the record?

Mr. Conliff. I do not think it has been sufficiently introduced.

154 Mr. O'Connell. I am introducing them right now; they are on file.

Mr. Conliff. I have no objection to the original or a copy going in if everything contained in these depositions, with the exception of the matters that go to the authenticity of the requisition papers before you is subject to the objection of the respondent. I have no objection to the original.

Mr. O'Connell. This is the deposition of Mr. McNeill.

The Court. Well, there are a little over a hundred pages. I do not know what is in these depositions. I do not know what these various objections are and it is a little difficult for me to rule without knowing something more about them.

Do you want to have it understood that I may take the depositions and read them and make my rulings on the objections?

Is that satisfactory to both counsel?

Mr. O'Connell. I think the whole thing should be incorporated so the Court of Appeals may know what was stricken; otherwise they would not know what the ruling was.

The Court. At this time I have not stricken anything from any of these depositions, but I would like to show if there is any short way to get at it. Do the depositions contain anything other than your efforts to prove a conspiracy?

Mr. O'Connell. Yes, they show absolutely the lack of jurisdiction on the part of the Court; they show a lack of jurisdiction on the part of the Court to issue that capias without any reason whatsoever; that there is no criminal charge against Pelley; that there is no reason, other than the conspiracy which we allege between the Dies

155 Committee and the Judge down there who issued it.

We brought out down there in these depositions that the Supreme Court of the State of North Carolina has said that a suspended sentence can't be imposed on that man, the defendant, until he has been charged with a

criminal offense against the law of the State of North Carolina.

The Court. You mean some other criminal offense?

Mr. O'Connell. Yes, which the Court must get before it.

The Court. Is that why you want to know whether there was any other criminal offense committed?

Mr. O'Connell. Yes. In other words, the fundamental rule in habeas corpus is that it will not be granted on information and belief, and the Judge said he issued the capias on information and belief.

The Court. You are going too fast for me. You say that the law in North Carolina is that sentence will not be revoked unless the defendant is charged with violating the law of the State of North Carolina?

Mr. O'Connell. Yes.

The Court. Is it necessary that he be convicted of it?

Mr. O'Connell. No. He must be charged with a crime before the capias can be issued.

The Court. Is that what you wanted to show?

Mr. O'Connell. Yes.

The Court. In view of that statement by you, you may show that if you can. You may show it.

Is it contended that he is charged with any other criminal offense?

156 Mr. Conliff. I beg your pardon.

The Court. Is it your contention that he is charged with any other crime?

Mr. Conliff. No, it is not our contention that he is charged with anything other than what the requisition papers contain. The contention of the Government is that such matters are irrelevant, whether he is charged or is not charged. Another point—

The Court (interposing). Just a minute. I want to get the facts.

He contends that under the law it is necessary in order to revoke his suspended sentence that there be a charge of another crime, but I want to get the facts. I want to know whether there was a charge of any kind of crime against him.

Mr. Conliff. I have no knowledge of that, of any violation charged in the indictment.

The Court. He did not limit himself to a charge by way of indictment.

Will Mr. Williams resume the stand?

Thereupon **Robert R. Williams** was recalled as a witness and, having been previously duly sworn, was examined and testified as follows:

The Court. You had better listen, Mr. O'Connell.

Mr. O'Connell. Yes.

By the Court:

Q. In view of that Mr. O'Connell said, tell me, if you can, whether or not there is any charge against Mr. Pelley in North Carolina of any other offense other than the
157 two offenses of which he was convicted, any indictment. A. I have no knowledge of any other indictment in North Carolina against Mr. Pelley, but I do have information of criminal violation which came up before the Judge on the extension of the sentence.

By Mr. O'Connell:

Q. Tell us what that information is. A. I don't—

Mr. O'Connell. There we are again, up against that same stone wall.

Mr. Conliff. I do not think that is relevant. Mr. O'Connell is trying to show that it is incumbent upon this Court to determine whether or not Mr. Pelley violated the terms of his probation. On the first count, the man is under a suspended sentence, and the Court has the power to revoke that suspension; as to the second count, the man was never sentenced, so it is immaterial whether he was ever convicted of any other crime or not.

The Court. All right, Mr. Williams.

(The witness left the stand.)

Mr. O'Connell. Look at that case, your Honor. That is the leading case on the subject (handing a document to the Court).

We have closed our case.

The Court. You have?

Mr. O'Connell. That closes our case.

The Court. I still do not know whether these depositions are in or not.

Mr. O'Connell. I have offered them in evidence.

158 The Court. They are filled with objections, and I can't rule on them without knowing something about them, unless you want to take some short cut; unless you want to read them.

Mr. O'Connell. Would your Honor like us to submit a brief on the subject? I am willing to do that.

The Court. No. I want to get all the testimony in first.

Mr. O'Connell. Does your Honor want to reserve your action on the depositions and to consider the objections made, to consider the refusal of the witnesses to answer and to decide whether you should require the witnesses to answer?

The Court. Do you want me to do that?

Mr. Conliff. I think we shall have to take each deposition at a time because I do not think there is anything proper in the whole volume of depositions. All the questions related to this conspiracy, this alleged conspiracy are matters that we consider incompetent and irrelevant.

The Court. You had better go ahead, Mr. O'Connell.

Mr. O'Connell. What action does your Honor wish to take on the depositions? They are here; they were taken by authorization of the Court, and both sides were represented.

The Court. You are offering the depositions in evidence, I suppose, and he says objections are constantly made in them. I cannot rule on them without knowing something about them.

Mr. O'Connell. Do you want to look these objections over and rule on each one separately?

The Court. Is that satisfactory to both counsel?

Mr. O'Connell. That is agreeable to me provided the Court also consider the refusal to answer and

159 whether they should be instructed to answer and give us a chance to get the answer.

As a matter of fact, the Clerk of the Court stated under oath that there is no criminal prosecution pending against Pelley; there has been no allegation made that he has violated the law of the State of North Carolina. That is in the deposition.

This order was issued capriciously.

Mr. Conliff. Even assuming that is in the depositions—

The Court (interposing). Let us dispose of this first. Let us stick to one thing at a time. I do not yet know what you want me to do.

Mr. Conliff. I am willing to stipulate, so far as they now stand if I am permitted to strike all portions of testimony off of those witnesses in the case that do not pertain to the question of the correctness of the authenticated record in the case and the identity of the defendant Pelley and the question whether he is now a fugitive from justice—if the deposition is confined to the record before you as a true authentic record of the Court of North Carolina, I am willing to let that part of the deposition go in, but anything else I object to.

The Court. Is that satisfactory?

Mr. O'Connell. That certainly is not. If that were the case then there would not be any use in having habeas corpus proceedings. As the decision of the Court stated, which was referred to, you are not to be bound by the record.

The Court. You want to go through it word for word and let me rule on it?

Mr. O'Connell. Yes.

The Court. Well, on pages two and three there
160 are no objections. What about page 4?

Mr. O'Connell. On page 3, there was a question asked of Judge Nettles:

"Question. Judge Nettles, who prepared the statement delivered by you from the bench at the time you ordered the capias for Pelley's arrest?"

He refused to answer. I ask the Court to instruct Judge Nettles that he be instructed to answer that question.

Mr. Conliff. I object to him answering the question.

The Court. No objection is there.

Mr. Conliff. Under the rules you are not precluded from making objecions at the time the depositions are offered.

The Court. So far as instructing the witness is concerned, I do not think there is anything before me at the present time on that. On this question I have an objection to the question.

Mr. O'Connell. Will your Honor review the questions as they go along chronologically as to whether—

The Court. (Interposing) You make your suggestions.

Mr. O'Connell (continuing). As to whether we have a right to insist on an answer. If we ask a question in good faith, a witness certainly has no right to refuse to answer.

Mr. Conliff. Mr. O'Connell had his rights at the time of the taking of the deposition. That is provided for under the new rules. Rule 81 says that they are not applicable to habeas corpus.

He filed his notice under the new rules and they provide that if a witness refuses to answer a question, the party taking the deposition can go before the District
161 Court down there and request an order be issued to compel the witness to answer the question; then, if he refuses to answer, he can get an order by the Court and he can be held in contempt of Court.

Mr. O'Connell. The matter was not in the District Court.

Mr. Conliff. According to the rules—

The Court (interposing). What is the rule? Give me the number. 81, you say?

Mr. Conliff. 81 is the rule which says these are not applicable to habeas corpus.

The Court. What is the rule you are relying upon on the method of getting the District Court to rule on it?

Mr. Conliff. Rule 37-A on "Refusal to answer".

The Court. What part of it?

Mr. Conliff. It says "If a party or other deponent"—

The Court. Tell me what it is. Which one are you relying on?

Mr. Conliff. "Refusal to answer".

The Court. Is it "A"?

Mr. Conliff. Yes, "A".

The Court. Just let me read it.

("He may apply to the Court in the District where the deposition is taken for an order compelling an answer.")

So, I deny your application for an order to compel these witnesses to answer the questions that they did not answer.

Mr. O'Connell. Regardless of what questions were propounded?

The Court. Yes.

Mr. O'Connell. I note an exception to your Honor's ruling.

162 The Court. Yes. On page 19 you asked whether he signed an order on the 19th of October, and on the next page "Was it dated the 19th of February?"

Is that order in the record here?

Mr. O'Connell. It is not. That is one of the orders that was stolen from the records.

The clerk answered that question further on in the deposition.

The Court. Excuse me just a second.

Mr. O'Connell. On page 41 he answered that question.

The Court. The clerk does?

Mr. O'Connell. Yes.

The Court. Just let me finish with the Judge's testimony; I am almost through with it.

I have read the deposition of Judge Nettles. You stand on every objection you made?

Mr. Conliff. I do.

The Court. I think that in order to rule intelligently on each one of them I shall have to read all of them. I will try to do that during the evening.

How many witnesses are there? Do you recall?

Mr. O'Connell. I think there are six or seven.

The Court. They are not indexed?

Mr. O'Connell. No, they are not indexed.

The Court. Is that all the testimony you have?

Mr. O'Connell. No. You have Mr. McNeill's deposition.

The Court. That was taken here?

Mr. O'Connell. Yes, your Honor.

The Court. Have you seen it?

163 Mr. Conliff. Yes, I was present at the hearing.

The Court. Is it free from objections?

Mr. O'Connell. No, sir.

Mr. Conliff. No, sir; it is not.

Mr. O'Connell. It is full of them.

The Court. I suppose I should take them and read them over.

Do you have any other testimony?

Mr. O'Connell. Yes, I have. I would like to offer the testimony of Chairman Martin Dies of the Dies Committee and his investigator, Mr. Barker, to show that regardless of what I have stated the law is regarding the issuance of a capias, to show that this capias was issued at their in-

stigation, and to show that they sent to North Carolina—

The Court (interposing). Do you have their depositions?

Mr. O'Connell. No, I haven't.

The Court. Do you want to call any witnesses?

Mr. O'Connell. I would like to call them tomorrow morning. However, I am ready now to argue whether your Honor should consider at this time, without their testimony, the question of whether or not they have complied with the law of the State of North Carolina.

The Court. Do you want to go on tomorrow?

Mr. O'Connell. I do not want to close the case. I would like to have Mr. Dies here.

Mr. Conliff. I object to the summonsing of any other witness by Mr. O'Connell unless he can show the Court that their testimony has some relevancy to this case. Mr. O'Connell keeps on saying that he is going to show what
164 the law of North Carolina is, and he is going to show—

Mr. O'Connell (interposing). Do you want me to show you, Mr. Conliff?

Mr. Conliff. I think I know as much about the law as you do, Mr. O'Connell.

He wants to show why the Judge issued the capias in this case for the return of the defendant to North Carolina. That is not before the Court. The only question before the Court is whether or not the constitutional requirements of the statute in compliance have been complied with and the Government submits that everything that is required by the statute has been complied with and every essential element has been proved. He is going into the—

The Court (interposing). Let me interrupt. There is nothing before me—

Mr. O'Connell (interposing). This is before your Honor (indicating).

The Court. Whether the witnesses testimony will be admissible, I will have to pass on that when the question is raised.

Mr. O'Connell. Well, isn't it fundamental that—

The Court (interposing). Don't ask me questions.

Mr. O'Connell. I will state it to your Honor. Of course, it is fundamental that this man—

The Court (interposing). What do you want me to do?

Mr. O'Connell. I think you should, without their being here, throw this case out and release the petitioner, and I will show you—

The Court (interposing). We have a regular way
165 in which to proceed. I think you had better get your testimony in first.

Mr. O'Connell. I want to have Chairman Dies here tomorrow and I want to ask as to what went on before this capias was issued, and I am convinced that if I show your Honor that this is not a bona fide extradition that you will permit me to put Dies on the stand tomorrow morning.

The Court. It is entirely for you to decide whom you shall call. Whether his testimony will be received, that I will have to consider when the question is asked.

Mr. O'Connell. I ask that you take a recess to study the depositions in this case which have been offered and resume tomorrow morning at ten o'clock, when I hope to have Mr. Dies here.

The Court. Do you have any testimony?

Mr. Conliff. No, we have no testimony because we stand on the requisition papers, which the Supreme Court of the United States says are sufficient.

Further, I object to the summonsing of Mr. Dies or anyone else if Mr. O'Connell can't show that he is going to testify to something that is pertinent.

The Court. I have already explained that I haven't anything to do with that.

Now, Mr. Mr. O'Connell, have you any briefs at all?

Mr. O'Connell. I beg your pardon?

The Court. Have you any briefs?

Mr. O'Connell. On what proposition?

The Court. On the various propositions whether I should dismiss or grant your motion. Tell me the grounds for your reason.

166 Mr. O'Connell. Will your Honor permit me to give further testimony?

The Court. This is without prejudice to your rights to give further testimony.

Mr. O'Connell. Thank you.

The Court. I am not undertaking to rule on the admissibility of that evidence but I am not asking you to close your case.

Mr. O'Connell. Thank you.

The Court. Just tell me what your contentions are.

Mr. O'Connell. My first contention is, and I believe it has been shown, that this capias was issued arbitrarily, and I believe we have shown that the Judge had no right to issue that capias.

167 We say to your Honor that unless and until Pelley violates the terms upon which the sentence was suspended, he does not become a fugitive. The question of fugitivity is before this Court. Mr. Conliff is attempting to say that after this sentence is suspended that they can drag him back at the whim and caprice of the Judge. I do not think there can be any question, any argument whatsoever as to that.

I say that you have got to find that the man is not a fugitive if he has complied with the terms of that provision. If he has complied with the terms of that provision he is not a fugitive and cannot be taken from one State to another.

The Court. Is that to the second count?

Mr. O'Connell. As to the second count, prayer for judgment continued, I say the terms upon which that was continued coincided with the terms upon which the first count was suspended. That is, the payment of costs applied as much against the second count as against the first count and by the payment of the fine.

I say further that the five years has expired. The code of North Carolina forbids any extension of the sentence and expressly forbids it being for a period longer than five years.

I say that it was unlawful and illegal and in violation of the constitutional privileges of this petitioner to enlarge or extend that five year original extension of Pelley's suspended sentence.

I say that they have not complied with the essential requirements; they have not shown that Pelley is charged with violating any law of the State of North Carolina, and that is a condition precedent to the issuance of the capias.

168 The Court. What is that case you have there? Is that the case you read before?

Mr. Conliff. Mr. O'Connell.

Mr. O'Connell. Just the headnotes. I have several others along the same line.

The Court. What is the case?

Mr. O'Connell. State versus Gooding, 194, North Carolina, 272.

The Court. Are you familiar with that?

Mr. O'Connell. I?

The Court. Mr. Conliff.

Mr. Conliff. No. What is the case?

The Court. The State versus Gooding, 194 North Carolina, 272.

Mr. Conliff. No, I am not, but I do not think that case has anything to do with this hearing.

Mr. O'Connell. You have not read it. How can you say that?

The Court. Just a minute.

All right. Proceed.

Mr. O'Connell. I would like to read to your Honor further cases: The case of State versus Hardin in 112 Southeastern 593 and also State versus Everitt in 154 North Carolina 399.

The Supreme Court of the State of North Carolina said:

"Where a judgment in a criminal case has been suspended on condition of payment of costs and good behavior, the term 'good behavor' by correct interpretation, means such conduct as is authorized by law of the State. In other words, a violation of some criminal law of the State must be made to appear before a defendant can be held to have violated the terms of such suspended judgment.

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"In order to be a valid sentence on such suspended judgment, it must be properly established by pertinent testimony that the conditions have been broken within the meaning and purpose of the above principle."

In other words, it is not sufficient to say that he has not been on good behavior; they have to charge the violation of the criminal law of the State of North Carolina.

In State against Hardin, 112 Southeastern, 593, the Court stated:

"The Court imposing judgment on the defendant cannot be upheld, for it appears neither by evidence nor finding of

the Court that there has been any breach of the criminal law of the State on the part of the defendant, since said judgment was suspended."

In the same case, the Court said:

"When the State Court, therefore suspended judgment on condition that the defendant should be on good behavior; that is, should not break the law for two years, this, without more, should be construed as meaning the State law, the only law the Court had jurisdiction to enforce; and where it appears that the defendant is keeping or has kept the law, it is both right and just that the State authorities should keep faith with him and forbear an imposition of sentence."

That is from State versus Hardin.

In State versus McHaffey, 114 Southeastern, 818, the Court said:

170 "Where a sentence was validly suspended pending good behavior, it could thereafter be enforced only for a subsequent violation of some law by defendant, and a judgment enforcing the sentence because defendant had previously pleaded guilty to a similar offense and had his sentence suspended by another judge must be reversed."

Then there is the case of State against Gooding, 139 Southeastern, 436. This is from the headnote.

The Court. I have read that.

Mr. O'Connell. Then there is the case of State versus Everitt, 164 North Carolina, 399.

The Court. Didn't you read that before?

Mr. O'Connell. It is a little bit different. It is as follows:

"This power of the Court to suspend judgment upon terms should not be exercised so as to prejudice or embarrass the defendant's rights to review the judgment and proceedings of the Court on which it is based, by appeal, if he elects to do so."

Now, the term of this case has elapsed. After the time for appeal has elapsed, that disposes of his constitutional rights, but that is a violation of the due process of law and it is a violation of the rights of the individual to prejudice

or embarrass the defendant's right to review the judgment, rights granted to him by the law.

What have we in this case? They said that he is not on good behavior; they want him back.

In the case of State against Everitt, 164 North Carolina, 399, the Court said:

171 "The findings of the trial judge in imposing a sentence under a suspended judgment on a criminal action are insufficient where they only permit the inference of a breach of the conditions and do not find the ultimate fact of guilt in infringing the criminal laws of the State."

In State against Hilton, 65 Southeastern, 1014, a North Carolina case, the Court said:

"It will thus be seen that, while the power to suspend judgment is allowed with us, there are well recognized restrictions upon its exercise, and no well conditioned decision, here or elsewhere, will uphold the principle that sentence may be pronounced after an indefinite suspension of judgment, where every condition attached to it has been complied with, the fine and costs paid, the defendant discharged by order of Court, and the cause removed from the docket. To allow a defendant under such circumstances to be imprisoned by the Court would afford opportunity for capricious exercise of arbitrary power unknown to the common law and disapproved and condemned by many well considered decisions of the present time."

I want to call your attention to the fact that the Court Clerk has stated under oath, and there was opportunity for examination, and the deposition was taken by authorization of this Court, and the Clerk there stated that there is no criminal charge pending against Pelley.

The Court. What page is that?

172 Mr. O'Connell. I think it is page 43.

The Court. Page 43?

Mr. O'Connell. On page 41 of the record, the record sent to the Court, is written in at the top in ink, "No order returned to the Clerk's office."

The Court. That seems to be in pencil.

Mr. O'Connell. I have a letter from the stenographer who notified me that that should be part of the record, that that was made by the Clerk.

The Court. (Reading)

"My docket does not show any criminal action against defendant since February, 1935."

Mr. O'Connell. That is right.

The Court. What else?

Mr. O'Connell. On page 45 there is also written in an answer as to when the February term of Court started.

The Court. Is that February, 19th?

Mr. O'Connell. It indicates February, 1940, and the Court record indicates that the Court term started February 19, 1940, being, of course, after the five years had elapsed when the Judge might have extended it, had he been authorized by law to do so, which he certainly was not allowed to do.

The Court. When did he enter it?

Mr. O'Connell. February 19, 1940. That is when he signed the order.

The Court. When was the sentence?

Mr. O'Connell. February 18, 1935, and the sentence was suspended for five years.

The Court. Well, was the order signed February 20, 1940?

173 Mr. O'Connell. That is in your papers. The reason we asked that question was the copy of the order sent by the Governor does not contain the exact date in February.

The Court. Is that the order of Judge Warlick?

Mr. O'Connell. Judge Nettles.

The Court. When was it?

Mr. O'Connell. I think I can find it for you. Unfortunately none of them have any captions on them.

I might say that the Judge who heard this case has issued no further orders on it. The Judge who suspended judgment did not even ask for this man.

The Court. I wish you would try to get the original order.

Mr. O'Connell. I think I can find it.

Mr. Conliff. It is in the requisition papers.

Mr. O'Connell. This is it, Exhibit D.

The Court. This is the February term, 1940?

Mr. O'Connell. That is right.

The Court. Let counsel for the other side make a note on that and tell me what he thinks about it. Term for term had been taken until February 19th.

Mr. Conliff. That is true, but the capias was issued back in October, 1939, ordering the man to be brought in for sentence.

Mr. O'Connell. I want to call your Honor's attention to the order in the papers.

The Court. Which one?

Mr. O'Connell. This is February, 1940, down in the middle, and the Court states—

The Court. Which page?

174 Mr. O'Connell. The first page, and the Court states with reference to the issuance of the capias:

"The undersigned Judge issued a capias for the arrest of the said W. D. Pelley to be brought before the Court for the purpose"—

And here is the purpose:

"To be brought before the Court for the purpose of imposing sentence on the said W. D. Pelley within the said period of five years."

Now, just imagine that! They would bring him back for sentence because the five years was about to expire. That certainly is a capricious and arbitrary exercise of power, and one which should not be permitted in this Court.

If the Court will look into the capias, it was issued on information and belief, and the North Carolina code forbids the issuance of the capias unless there is a sworn affidavit and the applicant for the issuance is examined under oath on that, that affidavit.

The Court. Where does it appear that it was issued on information and belief?

Mr. O'Connell. Hand me the papers and I will show it to you.

The Court. Yes.

Mr. O'Connell. The Judge states in his deposition when asked the question:

"Who asked you to issue the capias?"

He said:

"I thought of it myself."

And this despite what we already introduced by
175 way of the newspaper clippings that Dies many days previously said that he intended to have the suspended sentence imposed.

In accordance with our contentions, that these papers are not in order, I desire to offer to your Honor a certified copy, certified by the Clerk of the Court of Buncombe County. That relates to the order of the Court that bond be set in the amount of ten thousand dollars. Nowhere does a copy of that order appear in these papers.

Mr. Conliff. Yes, it does appear.

Mr. O'Connell. Show it to me.

Mr. Conliff. That appears in the requisition papers.

The Court. Does that cover the substance of what you wanted to say?

Mr. O'Connell. No. I have a great many other things to offer to your Honor.

The Court. Are they along the same points?

Mr. O'Connell. No, they are on other points.

The Court. Proceed.

Mr. O'Connell. I offer for the record my contentions that the requisition papers of the Governor of North Carolina contain no statement whatever of any crime alleged to have been committed by the petitioner in the State of North Carolina subsequent to his being placed under a suspended sentence on February 18, 1935.

I also want to call to your Honor's attention the fact that the said requisition paper of the Governor of North Carolina merely sets forth that the petitioner was placed under a suspended sentence and the capias issued for his arrest without in any manner specifying an offense alleged
176 to have been committed by the petitioner to justify the issuance of said capias.

Mr. Conliff. I object to that.

Mr. O'Connell. I am stating my reasons.

I desire further to call your Honor's attention to the fact that the affidavits in support of the Governor's requisition show on their face that they are based on information and belief.

In the sworn deposition taken of Judge Nettles where he admitted the capias was issued on information, he refuses to disclose the source of his information.

I further wish to call your Honor's attention to the fact that the petitioner is not under indictment in the State of North Carolina nor any other state of the United States. He was only indicted upon the charge on which he has already been tried.

The petitioner is not charged with any crime against the laws of the State of North Carolina nor any other state of the United States.

The Court. You are reading from the petition?

Mr. O'Connell. Yes, and adding to it whatever I think is pertinent.

The Court. What number are you at?

Mr. O'Connell. Number 6.

The petitioner has not been charged with a crime within the meaning of the word "crime" as used in the Constitution of the United States.

The affidavits supporting the Governor's requisition do not disclose the source of the information and beliefs set forth therein.

177 I say that it is mandatory in all cases to set forth the information, and that it be sworn to and verified by the Governor.

In that connection I have a case, People against Warden of City Prison of Brooklyn, 112 New York, 492, in which the Court said:

"An affidavit made before an officer in another State charging the realtor on information and belief with a felony, it is in that state without stating which grounds or belief for the sources of his information, was insufficient to sustain a warrant for realtor's arrest in New York, in extradition proceedings."

In 20, Federal, 298, the Court said:—

The Court. 20, Federal, 298?

Mr. O'Connell. Yes. The Court said:

"The representations of the executive of the demanding State are of no effect, unless supported by a duly authenticated copy of an indictment found, or an affidavit made."

I would like to cite in re Hampton, Common Pleas, 1895, 1 Ohio, in which the Court said:

"The prisoner will be discharged by the Court in extradition proceedings where the requisition is defective in sev-

eral particulars, as where it does not contain a duly authenticated copy of the indictment or affidavit, and the Court, on review of the evidence, is not satisfied that the extradition is not sought to bring the fugitive into the State—"

There is no affidavit here.

178 "As where it does not contain a duly authenticated copy of the indictment or affidavit, and the Court on review of the evidence, is not satisfied that the extradition is not sought to bring the fugitive into the State for the purpose of dealing with him summarily and unlawfully."

I would like to quote a case already cited here, 214 Federal—

The Court (interposing). I just want you to indicate the substance of your argument.

Mr. O'Connell. The substance is that this capias was issued capriciously and without any authority in law for it. The Judge who issued it admits under oath that he issued it on information and refuses to disclose the source of his information; that the five year period for the suspension of the sentence has expired; that the Judge unlawfully attempted to extend it; that Mr. Pelley is not charged with the violation of any criminal law of the State of North Carolina.

Unless such a violation is set out legally and judiciously, no capias can be issued. Unless he violates the conditions of the suspended sentence, he cannot be a fugitive.

Further, the Judge admits under oath that he has feeling in the case. He admits he has feeling in the case and that that is why he has certified the case to another Judge in the event that Pelley should be brought back there. He states that without any request from anybody he issued the capias, despite the fact that Martin Dies said that he was going down there to have a capias issued.

The Court. I think I get the substance of your
179 argument. I would like to ask the other side for their statement.

Mr. O'Connell. May I be permitted tomorrow morning to bring in Mr. Dies?

The Court. It is for you to bring in any witnesses. If you are going over the same questions you put to Mr. Williams—

Mr. O'Connell. No.

The Court. If you are undertaking to show the motive, I think we cannot go into that. I cannot tell you what my ruling is.

Mr. O'Connell. I can offer him as a witness on that question.

The Court. It is for you to bring whatever witness you want to. I have no control over that. I do not have anything to say about bringing anybody in. That is a matter for you to decide.

Mr. O'Connell. Yes, your Honor. I have a telegram here.

180 The Court. We will take a few minutes' recess, and then I will hear Mr. Conliff.

(A brief recess was taken, at the conclusion of which the following proceedings were had:)

The Court. Now, I am not sure whether I can read all the depositions, but he says in the first place that under the North Carolina statute you can't suspend the sentence for a longer period than five years; you can't suspend for a longer period the imposition of sentence. Is that correct?

Mr. O'Connell. I beg your pardon, your Honor.

The Court. You say under the North Carolina statute, the imposition of sentence cannot be for a longer period than five years?

Mr. O'Connell. That is correct.

The Court. He claims it must be within five years. As to the second count, you say the imposition of sentence was continued for five years and that there was no extension within that period of five years?

Mr. O'Connell. That is correct.

The Court. He says the time expired on February 17th.

Mr. O'Connell. February 18th.

The Court. Apparently the clerk says it was ended on February 19th.

Was the original sentence on February 19th?

Mr. Conliff. The original sentence was on February 18th, 1935.

The Court. Then it expired on the 17th?

Mr. Conliff. That is true.

The Court. I am just telling you what his propo-

181 sition is, as I understand it. As to the second count,

he would make the same contention, but he is also saying as to that that sentence was entered and then execution suspended, and the Court could not revoke the suspension unless the defendant had committed some crime in the State of North Carolina and upon some formality been accused of that new crime.

I gather he means a crime against the law of North Carolina.

Mr. O'Connell. That is correct.

The Court. Even if it was against the United States, would it justify the Court, but I do not know whether that is involved here at all. That seems to me to be rather strict, if the accused person should thereafter be convicted of violating a Federal law.

Mr. O'Connell. I have a case on it.

The Court. Well, he makes those two or three points, besides those others about the issuance of the capias on information. You just go ahead and give me your ideas.

Mr. Conliff. With respect to Mr. O'Connell's contention that the Court had no power to extend the suspended sentence on the first count for five years or to extend the issuance of the prayer for judgment on the second count for five years, I submit that that is absolutely immaterial. If we presume that the Court had no power to continue this for five years and that such order was irregular, it would have nothing to do with the extradition proceedings because the man was sentenced originally on February 18, 1935 for a period of five years and the first count was suspended, and as to the second count there was a prayer for a judgment continued for five years. He was subject to
182 the order of that court during this five-year period on both counts. The Court could bring him back in there, and as to the first count to determine whether the suspended sentence should be revoked, or the second count to determine whether the prayer for judgment should be considered and sentence imposed, the Court back in October of 1939 issued a capias for the arrest of this defendant.

In other words, the Court sent out an order, or, as we might say, a bench warrant to bring the man before him to determine whether sentence should be imposed, so this defendant can't come into court here and say, "Because I wasn't in the State of North Carolina, it was illegal for this court to issue this capias, and I don't have to go back

now and be subject to the ruling of the court to determine whether this suspended sentence should be revoked or whether he should be sentenced on the second count."

On February 19th the court may have issued this out of the abundance of caution, and the court had tried to get him prior to the expiration of the five years; they just put this on the docket, and the capias was issued before the five years was up.

The Court. Does the capias extend the five years?

Mr. Conliff. The capias extended it until they got the man back. This man can't leave the jurisdiction and then plead fugitivity as a defense to the charge: that stops the running of the five years. If he were brought back in October, he could have been sentenced at that time. As soon as that capias was issued, it stopped the running of the five-year period. The court issued this order on Febru-

183 ary 19, out of the abundance of caution.

The Court. If you can find me some authorities on that, it would be helpful. You are just using your reasoning now.

Mr. Conliff. He can't just disregard that second order. The extradition papers consist of his original indictment, his conviction, his judgment, and sentence showing the case was continued for five years, and before the expiration of the five years the court said it wanted him back, and he became a fugitive. That is the extradition case.

He is not charged with violating some new law of the State of North Carolina, or some Federal law. He is charged with the offense of the "Blue Sky Law" and violating the law relative to the false representation of the sale of securities.

I cited this morning cases holding that a man is still charged with a crime until judgment is completed and is charged until he serves his sentence. If a man is sent to the penitentiary and he escapes, that man can be extradited, and he can not come into court and say that he cannot be extradited because he is not charged with any new offense, but following that he can be brought back for the original offense. The purpose of extradition is to bring a man back for the original offense and until judgment is completed it continues to be a crime. There are cases on that, Federal cases, and cases in our Court of Appeals, and I do not think there is any question about it.

Mr. O'Connell. There is. I would like to have the citations. This man was not compelled to stay in the State of North Carolina; he could go anywhere he wanted.

Mr. Conliff. I think the most recent case is Reed
184 v. Colpoys 69 D. C., page 163. That was decided in 1938, about a year and a half ago. The Court said in that that a man who has left the State in violation of the parole is extraditable.

Mr. O'Connell. This man is not paroled.

The Court. Just a minute. Let him finish his argument.

Mr. Conliff. This man was paroled from the State of Illinois; he was living in the District of Columbia, having left the State of Illinois. He violated the terms of his parole, and the Court of Appeals held that a prisoner who had left the State pursuant to the terms of his parole and later violates the parole is subject to extradition.

Mr. O'Connell. Wasn't the point that he violated his parole?

The Court. Let him finish.

Mr. Conliff. It is the same question here. The court held:

"The appellant finally urges that we have equitable power to discharge the appellant and thus interfere with his extradition to Illinois, and that because of the lapse of time since his parole violation"—

Mr. O'Connell. Then he did violate his parole.

The Court. Will you let him finish his argument?

Mr. O'Connell. I don't think he is giving your Honor a fair argument.

The Court. Just a minute. We can only hear one at a time.

Mr. Conliff. The Court further said:

"We are cited no authority giving us such power and we know of none. We are further not impressed
185 with the equitable considerations urged. It is without dispute that the defendant committed, was convicted of, and was sentenced for a serious felony, and that he has not suffered the penalty imposed by law therefor."

That is the same in this case: The man was convicted; he was sentenced, and he has not finished serving his sentence. He has not suffered the penalty imposed by law.

The Court further said:

"If equitable considerations not known to us exist, they will undoubtedly receive the proper consideration of the Governor of Illinois under his pardoning power. We cannot and should not usurp that power by interfering with extradition properly requested."

Mr. O'Connell. What is that citation?

Mr. Conliff. Reed v. Colpoys, 69 D. C. Appeals, 163.

Mr. O'Connell. Wasn't that of a man who lived here for many years?

Mr. Conliff. Yes.

Mr. O'Connell. It was pleaded as an equitable consideration that he should not be sent back.

The Court. I think you should let him finish his argument.

Mr. Conliff. Counsel in the case pointed out that the man was living in the District of Columbia and had been employed here and this should be considered as to whether he had violated the terms of his parole.

That is the same as in this case, and the Court of Appeals said no, that that question is for the consideration of the court of the demanding State.

186 You have a requisition signed by the Governor in North Carolina. Mr. O'Connell is saying that you are to determine whether he has violated the terms of his suspended sentence: that is not for your Honor to determine; it is for the judge of the court of the demanding State who imposed the sentence. If that judge sees fit to issue a capias for his return there, he can determine the question.

Who can determine the question whether he has violated his probation or suspended sentence? The judge in that court is the one to determine that.

Mr. O'Connell states a decision of the Supreme Court of the State of North Carolina that a man cannot have a suspended sentence revoked unless he has been convicted. That may be true—

The Court. No, he did not say that. Unless he has been charged with a crime.

Mr. Conliff. Unless he is charged with a crime. Who is going to determine whether he is charged with a crime or whether his sentence is to be revoked? That is for the

judge in the court, and the judge cannot determine that until this man comes before the court.

Mr. O'Connell says he is going to be sentenced. We do not know that.

Mr. O'Connell. I beg your pardon; that is in your record that he is to be brought back for the purpose of being sentenced. I want to call your Honor's attention to that.

The Court. I shall have to insist on your letting him finish.

Mr. O'Connell. I do not like to interrupt, but I do
187 not want him making misstatements.

Mr. Conliff. I did not interrupt when Mr. O'Connell made misstatements in his argument with respect to the affidavit being required in a capias.

As I say, it is for the judge to decide whether this man should be brought before the court to determine whether his sentence should be revoked, and you have to consider the second count where the sentence was never imposed. It is a separate offense. The sentence was continued for five years. Then the court issued a capias. The court certainly had a right to do that. The court has that privilege and it was proper for it to do that and there are many cases of the North Carolina Supreme Court holding that sentence can be continued for a period of five years, which it was in this case. Then before the five years was up, this capias was issued.

There is a case, 212 North Carolina, page 48, which was decided in 1938. The defendant was indicted; his sentence was suspended. The judgment was continued and the court held that the court has the right to either suspend the sentence or to continue judgment, either continue judgment or impose a sentence.

Who has the right to determine whether the conditions have been complied with? That is for the court in the demanding State; it is not for the court in this District; it is only for the court in North Carolina that originally imposed the sentence; they alone have the right.

The matter is not before your Honor in this proceeding to determine what violation of the law this man may be guilty of; that is up to the judge who imposed the
188 sentence. They want to get this man back before the court.

At that time Mr. O'Connell can argue that sentence was arbitrarily imposed; he has a right to get a writ of habeas corpus in that jurisdiction; he may appeal from the sentence, but here we cannot attack the judgment of that court.

With respect to the Zerps, it is only when it attacks the jurisdictional phase; it does not go to the irregularity in proceedings, and that case does not apply to cases of this kind because it is only enlarged when it attacks the jurisdiction of the court.

With respect to the issuance of the capias, Mr. O'Connel says that the Code of Law of the State of North Carolina requires that it be supported by an affidavit before the judge can issue a capias. The Code does require when a warrant is issued, it shall be supported by an affidavit, but that is only when a man is charged with a crime.

However, after a man has once been indicted and the jury has seen fit to convict him, and the judge has seen fit to suspend the imposition of sentence, it is incorrect to say that before the judge can issue a capias, somebody has to file an affidavit before him. That is nonsense.

The main consideration in this case is whether or not the expedition proceeding is based upon the constitutional provision and the statute enacted pursuant to that constitutional provision which requires a certified copy of the affidavit and sworn to before a magistrate.

Mr. O'Connell is trying to mix up that affidavit sworn to before a magistrate with a capias issued by the court after the man was convicted. That has nothing to do with it.

There are any number of cases holding that a court
189 is not required to give a reason for revocation of parole. I cited the case of Reed v. Colpoys, 69 D. C. Appeals, 163.

There is also the case of Drinkall v. Spiegal, 68 Connecticut, 441, in which the Court said:

"The Court held that the legality of the revocation of a parole was not a question for the court of the asylum state but one for the courts of the demanding state 'for they alone have the right to construe their Constitution and laws.' "

That decision was never reversed.

Now, they want to determine whether this should be revoked.

The Court. Well, that is not the point. My question was with respect to the power of that court.

Mr. Conliff. It all merges together. If that court has power to revoke this man's probation, it is a question for the court down there to decide what they shall do.

The Court. But he says the power of the court has expired.

Mr. Conliff. How can it expire?

The Court. He says the five years has expired. Your argument is that after the period of five years, the court may extend it for another five years. What does the statute say on that subject?

Mr. Conliff. The statute provides that the original sentence which cannot be imposed for a period longer than five years can be extended.

The Court. Read that statute.

Mr. O'Connell. It is section 4655, paragraph 4 of the Code of Criminal Procedure of the State of North
190 Carolina under "Termination of Probation, Arrest, Subsequent Disposition:

"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time within the above limit."

That is clear-cut; there is no ambiguity there.

The Court. It says it "may be continued or extended, terminated or suspended by the court at any time within the above limit."

Then you mean the five years may be continued for another five years?

Mr. Conliff. Yes.

191 The Court. You mean that if the original order of probation or suspension of five years might be extended, but if the original period of extension is two or four or anything under five years, that also might be done?

Mr. O'Connell. Yes, they could have extended it from term to term.

The Court. Now, which construction do you wish me to accept?

According to your construction it could be continued forever, continuing as long as the man lives.

Mr. Conliff. No, if the Court please.

The Court. If it is beyond the five-year term, what is the limit?

Mr. Conliff. I think that statute speaks for itself, unless the man is a fugitive.

The Court. Yes, these statutes speak for themselves, but what is it that they speak?

Mr. Conliff. If the sentence was to be continued for a definite period it should have been continued during the five years that the sentence was supposed to run, but if the man becomes a fugitive, and he is wanted in the state, and he comes in later, that, because of his being a fugitive, defeats the purpose of it.

The Court. What prevents the Court from extending his time while he is a fugitive?

Mr. Conliff. The Court didn't think it was necessary, apparently, and never required it to be continued.

The purpose is to limit any continuance past the original sentence.

192 Take, for instance, the statute of frauds and limitations in the case of housebreaking, for instance—

The Court. The statute itself provides for that, that is not a question of construction.

Mr. Conliff. All the cases have held—I know that I can get authorities for that, that when a man is sentenced by a court and is placed on probation or goes to the penitentiary and is placed on parole, and he subsequently violates the terms of the parole or probation, a warrant is issued for his arrest, and he is apprehended some time after the original sentence expires, and he can be brought back and be sentenced as a parole violator or a probation violator.

The Court. Isn't there something in the statute that provides for that?

Mr. Conliff. No, that is just general law.

Of course the statute provides that a judgment shall not be continued for more than five years or extended after the original period has expired, but, naturally, it does not apply when he is a fugitive.

Suppose the Court had not issued the order extending the sentence. Suppose it was just the original sentence in February, 1935, to October, 1939. The Court has the right to bring the man back to determine whether or not he should

be sentenced, and the Court has the right to impose sentence.

Any other construction would be to suppose that the man is sentenced in South Carolina and the sentence is suspended, five years, and, one day, later, he goes to Europe or anywhere else, and the Court wants him back, and he stays away for five years and then comes back and says, "Well, I was away for five years, and the Court can do nothing to me."

193 That construction cannot be placed on anything.

The Court. Then why did he make the extension on the 19th of February?

Mr. Conliff. He just did that out of an abundance of caution, but, I contend, if the Court please, that disregarding all this, the Supreme Court has held that the only inquiry to be made can be determined right from the requisition papers, and they held that if the requisition papers on their face showed that the man is charged with a crime the Governor is protected in review by the courts and all he has to determine is whether a man is charged with a crime. The certificate of the Governor, certifying the facts in the papers, is sufficient, and the only other question to be determined is whether or not he is a fugitive. If he determines that, extradition is made and habeas corpus action is taken. An extradition hearing is not a judicial hearing, it is a summary proceeding.

The Court. I think I am familiar with that.

Have you anything to say about that?

Mr. Conliff. Just one more case, your Honor.

Our contention is that it is not necessary to go in to the North Carolina law. A certificate of the law is sufficient.

This case is the State vs. Hinson, 166 North Carolina, page 250. The Supreme Court of North Carolina has decided that the absence from trial is not equivalent to serving sentence, and Mr. Pelley, by staying away from the state for five years—

Mr. O'Connell. He has been in business there for
194 five years.

Mr. Conliff. But he has not been there since they wanted him in October.

Mr. Pelley has to go back there and raise his point, and let the courts take what action they see fit.

That is the whole theory of the case.

Here the whole question is whether or not he is charged with a crime, and I contend that the Governor has certified that he is charged with a crime. We know that he is not in North Carolina and he is wanted there, and that makes it a case for extradition, and the Supreme Court decisions show that that is sufficient to extradite a man.

The Court. Well, I guess we will suspend.

Do you have anything to add, Mr. Williams?

Mr. Williams. I would like to say that it is our understanding of the law in North Carolina that no man can take advantage of his own wrong by fleeing from the state, and that when the habeas was issued that that immediately suspended the running of that five years.

For instance, suppose a man got three months, and then left the state and stayed away for three months time and then came back and said, "No, I have been out for three months, you can't render judgment against me."

In the statute of limitations it is well known that absence from the state suspends the running of that, so it is suspended during his absence from the state.

I think that order of February was useless.

Our position is that, on a general proposition of law, no man can absent himself from the state with a war-
195 rant or habeas issued against him, and take advantage of the time that he was absent from the state.

Your Honor will note that this man was arrested in Washington prior to the extension of the five years, prior to the elapsing of that time, and he still refused to go back. Here I think the case is analogous.

I have not been able to find many cases on that, but I think perhaps the North Carolina case which Mr. Conliff cited to your Honor is analogous. There the sentence was for eight months, and the provision was that if he left the state within fifteen days that sentence would be suspended, so he left the state and stayed long beyond eight months, long beyond the end of his sentence. Then he comes back into the state and raised the question that the time of his sentence had expired, just as the defendant in this case raises the question that the length of time for which prayer for judgment had continued had expired. The length of time that he is away from the state does not affect that time. Here an eight months sentence was imposed on the defen-

dant and that expired, and he can go back and be sentenced for two or three more years after that.

The Court. That was the sentence.

Mr. Williams. Yes.

The Court. There wasn't any extension of the sentence, he was just told that if he left it would be all right, but here we have a formal suspension of the sentence.

Mr. Williams. Suppose the man had gone for six months immediately after that time that the sentence was imposed, suppose he left the state and violated the
196 terms of his parole outside of the state, there are authorities in the courts that hold that if he violated a parole outside of the state that that would be within the provision of the law and that he would be a fugitive from justice.

Suppose he had a suspended sentence for six months or three months, and then he left the state for more than three months, absented himself from the jurisdiction so that it was impossible for the state to enforce the terms of the parole.

The Court. Do you have authorities on that subject?

Mr. Williams. If your Honor please, I do not.

The Court. Let me ask you this question.

Mr. Williams. Yes, sir.

The Court. This question was raised, if the Judge can set aside an imposition, where the suspended sentence continued on good behavior, he can't set that aside; is that the law in your state?

Mr. Williams. As I understand the law, good behavior means conforming with the laws of the state, but I don't understand this law. I understand the decisions which he has read in support of this, that it is not necessary for a new indictment to be obtained. A Judge hears the matter of the sentence and hears evidence and determines whether or not there has been a violation.

The Court. Must the violation constitute a crime?

Mr. Williams. It must be an offense against the laws of the State of North Carolina. There doesn't have to be an indictment, but the Court can find that there has been a violation when the matter comes up for hear-
197 ing regarding a suspended sentence.

The Court. You have authorities on that?

Mr. Williams. That is right.

There is another answer to that question that the Court asked, as to whether or not there has been a violation of the law, and the second and conclusive thing is that in addition, on the second count, there is no such requirement. The prayer for judgment continues, according to the North Carolina authorities, so that the Court, of its own motion, without finding any violation, could suspend sentence.

The Court. Do you have anything on that subject?

Mr. Williams. He has.

The Court. I understand that 4,665 applies to that as well as to the extension, period of probation, or the extension of the sentence, the first and second counts.

Mr. Williams. I am not interpreting that statute as to whether or not the period of probation or suspension of sentence—

The Court. Can the Court continue that prayer for judgment for ten years?

Mr. Williams. I can't say, because I am not an authority on that proposition.

The Court. You don't know whether there are any decisions on that?

Mr. Williams. No, sir, but I will say that this statute is very recent, a statute in 1937, there was no statute governing it at that time.

The Court. I think I get the point of it, and if you find any further authorities tonight, I would like
198 to have them tomorrow morning.

Mr. Williams. If your Honor wants authorities that if the prayer for judgment continues the Court can enter that judgment at any time, it doesn't have to require the records about good behavior in the first count, it is not necessary to show that under the second count, he can enter judgment at any time.

The Court. We will suspend.

Mr. O'Connell. Will your Honor permit me to answer that tomorrow morning?

The Court. Yes.

We will suspend at this time.

(Thereupon adjournment was taken until 10 o'clock a. m., Friday, April 5, 1940.)

199 *Transcript of Proceedings*

Filed June 28 1940

* * *

Washington, D. C.

Friday, April 5, 1940.

The trial of the above-entitled cause was resumed before Associate Justice Jesse C. Adkins in Civil Division No. 1, at 10 o'clock a. m.

Appearances:

On behalf of Petitioner:
T. Edward O'Connell.
Franklin V. Anderson.

On behalf of United States of America:
John C. Conliff,
Assistant United States Attorney.

On behalf of the State of North Carolina:
Robert R. Williams.
Albert L. Cox.

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200 *Proceedings*

Mr. Conliff. If your Honor please, may I continue my remarks which I was making yesterday afternoon when we adjourned?

The Court: Let us see if there is anything else to come before the Court; then we shall complete the arguments.

Mr. O'Connell. No, I am willing to let him finish his argument.

The Court. Is there anything else in the way of testimony? Then we shall get rid of the arguments. What I wanted you to do last night was to give me an outline.

Mr. O'Connell. I should like to have the Marshal's return on three subpoenas which were issued yesterday for Mr. Dickstein, Mr. Dies, and Mr. Robert Barker, to see whether on not they have been served. I understand that Mr. Dies is to be present in the courthouse this morning, and I should like to hear from him.

Mr. Conliff. I understand, if your Honor please, that Mr. Dies and Mr. Barker are before the grand jury this morning. They were served with subpoenas prior to the ones Mr. O'Connell issued, and they will be tied up before the grand jury, I am informed, for about forty-five minutes.

Mr. O'Connell. For how long?

Mr. Conliff. For forty-five minutes—three-quarters of an hour.

Mr. O'Connell. Is it your understanding that they will then come down?

Mr. Conliff. That I do not know, Mr. O'Connell.

201 Mr. O'Connell. Did you talk to the gentlemen?

Mr. Conliff. No.

Mr. O'Connell. I should like to know. If they are to be there for forty-five minutes, I should like to have the Court order them down afterward.

Mr. Conliff. One of the Assistant United States Attorneys told me that Mr. Dies and Mr. Barker were to appear before the grand jury this morning, they having been served with subpoenas, and they expected to be down here in about forty-five minutes. Whether or not they were served with Mr. O'Connell's subpoenas, I do not know.

The Court. Have you anything else in the line of testimony?

Mr. O'Connell. I have issued subpoenas for Judge McMahon and Mr. Karl Kindleberger, and I should also like to have the testimony of United States Attorney Curran. This all goes—and I want to make the offer—to show that there is a conspiracy to railroad this gentleman back to North Carolina.

The Court. Suppose you make your offer of what they will prove. If that is the purpose, as I understand the decisions of the Supreme Court, it is something that this Court cannot go into.

Mr. O'Connell. Of course, my understanding is, under Johnson against Zerbst, that the Court can do anything, even suspend its own rules.

The Court. Mr. O'Connell, I have told you what my ruling is. You have argued this at considerable length, and I do not care to hear further on this particular point.

Mr. O'Connell. I think I should be privileged to
202 put them on the stand in order to let your Honor hear the words come from their mouths. As to every absent witness I have offered to your Honor in this case, your Honor has forced me to reveal to the attorneys for the respondent what I hope to show by them.

The Court. Suppose you take them one by one and tell me what you expect to prove.

Mr. O'Connell. First, I want to note an objection to your Honor's forcing me to reveal what I intend to show by any witness who will willfully absent himself after being subpoenaed to appear before this Court.

I intend to show by former Judge Curran that a warrant or an application for a warrant was sent to him for the arrest of Pelley while Pelley was before the Dies Committee and that he refused to O. K. the issuance of that warrant.

I intend to show by Judge McMahon that an application for a warrant came before him and that he passed the buck and sent it to Judge Curran. When Judge Curran refused it and sent it back to Judge McMahon, it was then issued.

I intend to show by Mr. Kindleberger that this whole matter, exactly as it is here today, was yesterday, and has been since the case started, was presented to him; that an application for a warrant was requested; and that he, due to the fact that no crime was alleged or no law violation was alleged in the statement furnished to him, refused to issue the warrant.

I wish to show that thereafter the same mysterious forces who have paid this private public prosecutor here—

Mr. Conliff. I object to that.

Mr. O'Connell. You can object when I make the statement.

I can prove here, if you will permit me to ask the
203 question, that then the pressure was put on, that a warrant was issued after having been refused for good cause, that a bond of $2,500 was set by Mr. Kindleberger, that this defendant was arrested illegally, unlawfully, and unconstitutionally; and that he was taken to headquarters and as he was about to put up the $2,500, then and there under an order coming from this mysterious principal, whose gold this man has in his pocket—

Mr. Conliff. I do not think this is proper argument.

The Court. I understand that this is a statement of what he expects to prove.

Mr. O'Connell. I expect to prove that thereupon the bond, for no good reason shown, was raised to $10,000.

I intend to call Mr. Conliff to the stand and ask him—whether or not it will be permitted, I don't know—if he has ever, since he has been in the United States Attorney's Office—

The Court. He is right here; you may do what you please.

Mr. O'Connell. I will call him to the stand right now.

Thereupon **John C. Conliff, Jr.** was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Connell:

Q. What is your full name? A. John C. Conliff, Jr.

Q. You are an Assistant United States Attorney? A. That is true.

Q. You are in charge of the records division and the clerks in the United States Attorney's office? A.
204 That is true.

Q. How long have you been in charge of the records division and the clerks in the United States Attorney's office? A. Since 1931.

Q. You are familiar with the rules of practice in that office, are you not? A. If you refer to the records in the Clerk's office of the United States Attorney's office, I am.

Q. You are now in charge of habeas corpus proceedings in that office, are you not—or extradition proceedings? A. I am in charge—I am usually assigned to extradition proceedings.

Q. How long have you been accustomed to being assigned to such matters? A. For approximately two years.

Q. In all those two years have you ever seen any special prosecutor in any extradition proceeding come before this Court from the demanding State in an attempt to force the return of the alleged fugitive?

Mr. Williams. We object.

The Court. The objection is sustained.

Mr. O'Connell. I note an exception. I have no further questions.

(The witness left the stand.)

Mr. O'Connell. Both Mr. Dies and Mr. Barker have been personally served, your Honor.

The Court. Very well.

Mr. O'Connell. That is what I have to offer as to the gentlemen I have named: Judge McMahon, Mr. Curran, and Mr. Kindleberger.

205 I think I should be permitted to say this: I say that there is no rule in this Court to prevent me from inquiring into whether or not there is a conspiracy against this man. To say that there is would be to say that private persons could prostitute the processes of this Court for their own purposes.

I have nothing more to say on the subject.

The Court. In my judgment, the testimony which you propose to offer by these men is not admissible; and if they were here as witnesses I should be compelled to sustain objections to their testimony.

Mr. O'Connell. Would you further be constrained to refuse, since I have offered a Supreme Court case which says that the revocation of a parole or probation or the imposition of a heretofore suspended sentence may not be subjected to or lie within the power of any judge's caprice or whim, to permit me to show by Martin Dies that he publicly announced to the press that he was going to North Carolina to have this suspended sentence revoked and the sentence imposed? I intend to ask that question. I can confront him with Associated Press dispatches quoting him to that effect.

I intend to show that he sent his private investigator to North Carolina to scan the private correspondence of Pelley, seized without a search warrant, and that should certainly have the attention of this Court.

I have offered in evidence an order by the Judge commanding the sheriff to go forth and seize anything belonging to Pelley, with no affidavit attached to that order, without any reason whatsoever. The whole case smacks of the days of Lord Jeffries.

206 The Court. This comes within the ruling I have already made. I do not think it is permissible.

Mr. O'Connell. You won't permit me to show that the whole proceeding was originated, and that the Judge did things directed by Martin Dies?

The Court. No.

Mr. O'Connell. Exception.

The Court. Suppose you proceed with the argument in the case. You were arguing yesterday, or giving me an outline, with respect to what your contentions were. Now that the testimony is all in—I assume you have no more testimony to offer?

Mr. Conliff. No.

The Court. Since the testimony is now all in, I think it would be more logical to let Mr. O'Connell add anything more to what he was saying last night that he desires, and you may answer that.

Mr. Conliff. If your Honor please, at this time I should like to confine my argument solely as to what question is before your Honor.

The Court. I think that perhaps you have not caught my suggestion. Since we have now reached the point where we are arguing the case finally, probably Mr. O'Connell has the right to add anything more that he desires.

Mr. O'Connell. No, I will permit Mr. Conliff to have the floor. I will close when he finishes.

The Court. You will content yourself with replying to him?

Mr. O'Connell. Yes.

The Court. All right.

207 *Argument in Behalf of the United States*

by

Mr. John C. Conliff, Jr.

Mr. Conliff. There is just one matter I should like to have straightened out, and that is this: My contention is that it is beyond the scope of this Court to go into the North Carolina law, into the North Carolina decisions, and into their judicial proceedings; that the hearing before this Court is confined to whether or not this defendant is substantially charged with a crime, whether or not he is the

party named in the requisition paper—I think that is stipulated—and whether or not he is a fugitive from justice.

As I understand it, there is no question about the fugitivity of this defendant. The man was indicted, convicted, and sentenced in the State of North Carolina, and prior to the completion of that sentence he left the State and was not found in the State when he was wanted. Under the decisions of the United States Supreme Court, quoted yesterday, I think there is no question that this man is a fugitive.

So, it comes down to whether or not the man is substantially charged with a crime. With respect to that, I respectfully submit that the only question is whether or not the requisition papers in and of themselves substantially charge this man with crime. The Chief Justice of this Court found that they did. I have a decision of the United States Supreme Court, which I called to your Honor's attention, and other decisions holding that in a hearing on a habeas corpus in an extradition matter the papers alone are sufficient. If the executive authority of the asylum state determines to his satisfaction that a substan-
208 tial charge is made out in the extradition papers—rendition papers—that answers the purposes of the statute.

Mr. O'Connell in the cases he cited on habeas corpus went into the question of habeas corpus generally. There is no question that habeas corpus has been enlarged upon in recent years, but that does not apply to hearings on extradition matters. An extradition hearing it not a judicial proceeding, as your Honor is well aware; it is a summary proceeding before the executive of a state. It is purely a statutory proceeding.

As stated yesterday, the Constitution provides, in Article IV, section 2, as follows:

"A person charged in any state with treason, felony, or other crime—"

The Court. Yes, I have it.

Mr. Conliff. I suppose then, that it is not necessary to read it. The statute enacted to give force to this constitutional provision is section 5278 of the revised statutes.

The Court. I have read it two or three times, and I have it right before me.

Mr. Conliff. In the case of Pierce versus Creecy, 210 U. S. 387, at page 404, two lines from the bottom of the page—I have marked the place, if your Honor cares to see it—the Supreme Court of the United States uses the following language:

"This Court, in the cases already cited, has said, somewhat vaguely but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially
209 charged with crime. This indictment meets and passes that standard, and is enough. If more was required it would impose upon courts in the trial of writs of habeas corpus, the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter of the spirit of that instrument which requires or permits its performance."

There is the Supreme Court of the United States saying that it is not proper for a judge in a habeas corpus proceeding to go into the validity of the laws of or judgment of a demanding State. I am so sure of this point, your Honor, that I challenge Mr. O'Connell to show me a single case in the Supreme Court or a single Federal case holding that it is necessary for the executive or for the justice on the hearing of a habeas corpus after the extradition to go into the validity of the laws of the demanding State.

Mr. O'Connell. We have not contested the validity of the laws. We rely on those laws, rather than contest them.

Mr. Conliff. The question is what the law is here. This case holds that it is not necessary to go into the laws of the demanding State. I have been unable to find—and I have spent a great deal of time on the subject—any cases to the contrary.

210 There are cases of habeas corpus going into the question of the propriety of sentence, whether or not

the court has a right to impose such a sentence, when the court has a right to revoke a suspended sentence, and so forth, but all that goes to the merits of the case in the jurisdiction where the man is wanted. That is proper defense to the charge in the State where the man is wanted.

It is the same as the statute of limitations. In a case where a requisition was submitted to the governor of an asylum State, and the requisition showed on its face that it was barred by the statute of limitations in the demanding State, the Supreme Court of the United States said—and I have the citation, if your Honor wants it—that in its opinion there was no question that the man would beat the case, but it was not a question for the court of the asylum State to determine.

I hand your Honor the case of Pierce versus Creecy. It is marked here.

In the case of Marbles versus Creecy, in 215 U. S. 63, at about the center of page 67 the Supreme Court of the United States uses the following language:

"It was made to appear by those documents that the accused was charged by indictment with a specified crime against the laws of Mississippi and had become a fugitive from the justice of that State. That was legally sufficient, without more, to authorize a requisition, and when the Governor of Missouri was furnished, as he was, with a copy of the indictment against Marbles, certified by the Governor of Mississippi to be authentic, it then became the
211 duty of the Governor of Missouri, under the Constitution and laws of the United States, to cause the arrest of the alleged fugitive."

Further on, at page 68, the Court says:

"But those facts were determinable in any way deemed satisfactory by that executive, and he was not bound to demand—although he may have required if the circumstances made it proper to do so—proof apart from proper requisition papers that the accused was so charged and was a fugitive from justice."

There you have the Supreme Court of the United States saying that the executive is not bound to demand proof apart from the proper extradition papers.

In the case of Kentucky versus Dennison, a very old case, one of the cases that first determined matters of this kind, and, incidentally, a case which has never been reversed and is still cited by the present decisions, found in 24 Howard 66, at page 107 the Court says:

"Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the executive authority of the State of Ohio."

212 Another case, a more recent case, in the Supreme Court of the United States, found in 245 U. S. 128, at the top of page 135 the Court says this:

"This much, however, the decisions of this Court make clear; that the proceeding is a summary one"—

This is a proceeding similar to that, which was a habeas corpus proceeding arising out of an extradition proceeding, and the Court is talking about the habeas corpus proceeding—

"to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this Court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding State."

Of course, all the decisions say that fugitivity is a question of fact, not a question of law.

The point was raised in that case about the statute of limitations, where it was found from the requisition papers that the indictment was barred by the statute of limitations.

The Court said that that was a matter for the demanding State and not the asylum State.

In the case of In Re Keller, 36 Federal 681, page
213 682, the Court said:

"If the Governor of the State of Wisconsin has conformed to the laws of Congress passed for the purpose of enforcing a constitutional right, no court can become a barrier to the exercise of that right. It is a duty imposed upon the governor of the State in which the fugitive is found to obey the demands of the executive of the State in which the crime is alleged to have been committed, and, by warrant, arrest the party for the purpose of being delivered up and removed to that State."

Then it quotes the revised statutes which make it the duty of the executive.

I have only one more case to call to your Honor's attention, and that is the case of State ex rel Lea versus Brown, decided in 1933 by the Supreme Court of Tennessee, reported in 166 Tennessee 669. This case they attempted to get into the Supreme Court of the United States, and certiorari was denied in 292 U. S. 638.

The Supreme Court of Tennessee considered the points in that case. Paragraph 9 of the syllabus, to make it short, says:

"In habeas corpus proceeding to test validity of extradition warrant, only questions open for consideration are whether petitioners are charged with crime in demanding State and are fugitives from justice."

Paragraph 10 of the syllabus says:

"In habeas corpus proceeding to test validity of
214 extradition warrant, court held without jurisdiction to inquire into validity of judgment of foreign courts as basis for granting or denying extradition."

The language of the Court is this —and I hope I am not taking too much of your Honor's time in reading these decisions, for I think they are all pertinent and absolutely applicable to this case and set out without any question that the requisition papers are alone sufficient to show a substantial charge of crime.

"(9) In our opinion, the only questions open for consideration in this proceeding are whether the relators are charged with crime in North Carolina and are fugitivies from the justice of that State. These were the only questions proper for the Governor to consider in determining whether he should issue his warrant on the demand of the Governor of North Carolina.

"This is not a case in which it is sought to enforce a judgment. We have no jurisdiction to enforce the judgment of a sister State, imposing punishment for a violation of its laws. Our jurisdiction is limited to the determination of whether the conditions to extradition prescribed by the Constitution and laws of the United States, the charge of crime and the flight from the demanding State, are satisfied."

Incidentally, this fugitive was wanted in the State of North Carolina; he was apprehended in Tennessee.

"If the procedure followed by the State of North
215 Carolina in the trial and conviction of the relators violated any of their constitutional rights, and if there has been no conclusive adverse adjudication of those points, it would nevertheless be our duty, under the Constitution of the United States, to presume that such wrongs will be remedied when and if the relators are restored to the jurisdiction of North Carolina and steps are there taken to enforce the judgments of its courts. We repeat, this proceeding in Tennessee is not a proceeding to enforce judgment of the North Carolina courts, but is purely incidental thereto, and the only inquiry open here is whether the Governor of Tennessee rightfully concluded that relators, being charged with crime in North Carolina, have fled to Tennessee from the justice of that State."

There is a case, if your Honor please, exactly in point. In that case the fugitive attacked the judgment of the court in North Carolina, such as is attempted to be done here. The Supreme Court of Tennessee held that the judge in a habeas corpus proceeding had no power to inquire into the validity of the judgment in North Carolina. It is purely a matter of defense.

The defendant in this case, if he is returned to North Carolina, can, when he gets back there, attack the validity

of their judgment and can question whether or not the court had the power to revoke the suspension of his sentence. He can attack the judgment whereby the imposition of his sentence was suspended for a period of
216 five years. All those matters are matters of defense. He is not barred from any of his constitutional rights. When he gets back there, he may take any steps he wants to to defend himself against this judgment.

These questions are not before your Honor. The only question before your Honor is whether the judgment shows this man to be sustantially charged with crime. The Government respectfully submits that it has shown that he is.

With respect to the decisions of the State of North Carolina, our argument is based entirely upon the fact that they have nothing to do with this proceeding. If your Honor by any chance desires to inquire into them, Mr. Williams is here and is familiar with them.

The Court. Would you like to make a statement, sir? I will be glad to hear from you.

Mr. Williams. There are a few remarks that I would be glad to make. I know that your Honor is a busy man, and I do not want to impose upon your time. However, this is an important matter for the State of North Carolina.

The same point which was argued yesterday about the capias and the passing of time was presented to Chief Justice Wheat, and the same argument on the matter of extradition was made before him by the gentleman, and the Chief Justice was entirely satisfied with our statement of the law on the proposition.

I will say to your Honor frankly that I have been unable to find any decision, one way or the other, decisive of the identical point, which is as to the time having expired on this suspended sentence. I think that the burden of proof is on them to show that.

But I have found decisions, and there are various
217 decisions on analogous matters which, I think, bear upon this question. I shall present the points to your Honor briefly.

First, as I stated before, it has been generally held that where a person is sentenced for eight months in North Carolina—sentenced for a period of time, and then escapes and flees, although he may be out of the State for five

years or ten years, he can be brought back to serve that time.

It is also generally held that when a man has been convicted and he flees the State before sentence is imposed, although there may be a statute or a requirement of law for the imposition of sentence at that particular term, yet when he voluntarily absents himself from the State, that sentence can be imposed at any subsequent time when he can be apprehended and brought into the State.

I say that that is analogous, if your Honor please, because here is a prayer for judgment continued. On that second count no sentence has been imposed at all. By acquiescence on the part of the defendant that prayer for judgment was continued for a period of five years. At any rate, North Carolina had a right to impose that sentence at any time within the five year period.

The Court. Whenever the judge—

Mr. William (interposing). In his discretion might consider it advisable.

I have here a North Carolina case directly on that point, if your Honor cares to hear it. There are the cases of State against Everitt and State versus Burnett, which refer to the famous Massachusetts case, where they just say "Lay the indictment on the file."

218 The Court. You may go ahead in your own way.

Mr. Williams. I have the authorities, if your Honor cares to hear them.

Mr. O'Connell. I think we ought to have them, your Honor.

Mr. Williams. Very well, sir; if he wishes me to digress, I can give them to your Honor.

The Court. State versus Everitt?

Mr. Williams. State versus Crook is another, 115 North Carolina 760.

The Court. I understand you to say that they hold that where imposition of sentence has been continued for a definite period, the Court may impose sentence whenever it seems good to him?

Mr. Williams. Yes, sir. There is no doubt about that.

Then, there is the case of State versus Hinson, in 156 North Carolina.

The case of Commonwealth versus Dowdican is in 115 Massachusetts 136.

The Court. Which case is this?

Mr. Williams. I am just trying to find the Everitt case. They have cited State versus Crook.

Mr. O'Connell. State versus Everitt is in 164 North Carolina.

Mr. Williams. The Everitt case is one of the most important along that line. It follows the Massachusetts case of Commonwealth versus Dodican, because that case is cited in all these cases. Every one of these has a procedure which is a little different procedure, but the principle is the same.

219 "In Commonwealth versus Dowdican, 115 Massachusetts 136, we find a recognition of the principle we have stated in the long-continued practice of the courts of that State, which eventually (in 1865 and 1869) received the sanction of the legislature. The Court said:

" 'It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the Court is satisfied that by reason of extenuating circumstances or the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the Court in its discretion may impose, that the indictment be laid on file.' "

That is the only difference, your Honor. They say "lay the indictment on the file"; we say "continue prayer for judgment."

"Such an order is not equivalent to a final judgment or to a nolle prosequi or discontinuance by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuance upon the docket, and leaves it within the power of the Court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment thereon. Neither the order laying the judgment on file nor the payment of costs, therefore, entitled the defendant to be finally discharged.

220 It must appear that under the name of laying the

indictment on file the courts of that State accomplished the same result attained here by suspending judgment''—

or continuing prayer for judgment.

''Such orders are not prejudicial but favorable to defendants, in that punishment is postponed, with the possibility of escaping it altogether; and it is presumed that the party adjudged guilty is present and assenting to it if not asking for such orders.''

As I said to your Honor, here is an open case; no sentence has ever been passed on this man on this second count. It is just there yet for this man, with power in the Court to pass it. Now, the man absents himself from the State of North Carolina. A capias is issued three or four months prior to the five year period. That capias is returned, and the records show that the man cannot be found in Buncombe County or in the State of North Carolina. So, we have a man with a capias. That is the regularly prescribed method of bringing a defendant into court and, as stated by Mr. Conliff, has the same effect as a bench warrant for bringing him into court after conviction, with the same view that a warrant would bring him in before a conviction for the purpose of being tried.

Now, just as a warrant stops the running of any statute, and puts him there just as if he were present in court at the time—and it is a well recognized principle that when a warrant is issued, there are no limitations against the crime prescribed by the statute; the issuance of a
221 warrant tolls the statute—the issuance of that capias is the prescribed method, a regular criminal writ, for bringing a man to court after conviction. Your Honor is familiar with that. I have here a definition in Corpus Juris and the authority for it, but that is the regularly prescribed method, just like a bench warrant.

Our position, if your Honor please, is this: that this being an open case, with the right of the Judge to impose sentence at any time within five years, when that Judge issued that capias and said, ''Bring Mr. Pelley into court for the purpose of seeing whether or not sentence should be imposed,'' and Mr. Pelley, according to his own testi-

mony, was out of the State, and, according to the return of the writ by the sheriff, could not be found within the State of North Carolina, that capias, that issuance of a warrant, had the same effect as if it had brought Mr. Pelley into court right at that time, and he cannot plead his absence from the State or his remaining away from the State.

As I stated yesterday, suppose, for instance, he had continued prayer for judgment until the next term of court, which is frequently done, and Mr. Pelly had absented himself from the State until after the next term of court and had then come back and said, "The time has passed for the imposition of sentence; you didn't impose sentence at that term of court, so you can't impose it at all," that is what Mr. Pelley is saying here now. He is saying, "I was out of the State of North Carolina from the time of the issuance of the capias until the four years had expired; therefore, you can't impose any sentence on me."

If your Honor please, I will state frankly that it is
222 unfortunate that the order of February was issued, because it complicates this case. I stated to your Honor yesterday that I considered that order to be useless. However, I am willing to take it up in the courts of North Carolina. It is a fundamental principle of criminal law that no sentence may be imposed or action taken prejudicially that tends to interfere with the personal liberty of a defendant except in his presence.

Now, then, Mr. Pelley, upon issuance of that capias, absented himself from the State and could not be found. Frankly, I say, it was useless. I think that if that order had been issued in Pelley's absence within the five years, that extends time within which sentence could be imposed. That was a deprivation of the personal rights of Pelley, and the gentlemen of the opposition would be arguing to your Honor—and I think they made some reference to it before Chief Justice Wheat—that that was an invalid order, because no order of that kind could have been made in the absence of Pelley. That being so, it is just as if no order were here. We are relying on this capias entirely.

Frankly, I would be very much more disposed to attempt to sustain the validity of this order on the ground that it was within the five years than I would on the ground of

its being made in his absence. I will just state this briefly; I do not think it is particularly material.

We have a regular criminal court beginning on the third Monday of each month of the year; we do not have a continuous criminal court in our county. All judgments in criminal court at term are in fieri during the term of court subject to any change or modification that may be
223 made to the judgment and only become finalities at the end of court. That judgment, while it is on the minutes of February 19, is a judgment of that term of court and does not become a finality until the adjournment of court.

The Court. This is the order?

Mr. Williams. Well, yes, the first order—the judgment.

The Court. In 1935?

Mr. Williams. Judgment in 1935, yes. It just so happened that the date of the third Monday in 1935 was a few days before the date of the third Monday in 1940, and this order was made in 1940 on the first day of the term. The other judgment was made on the first day of the term, because he was convicted at the January term and held over to the February term by request, and it just so happens that the date of the third Monday of the February term, 1940, was a day or two after the date of the third Monday of the term in 1935.

The Court. You say the order of 1935, though it bears the date of the term—

Mr. Williams. This term, yes.

The Court (continuing). —would be final when the term concluded?

Mr. Williams. Yes.

The Court. Would the same thing be true of the order of 1940?

Mr. Williams. I don't know about that, but it is a term judgment.

The Court. When did the term expire?

Mr. Williams. That may bring some bearing, and it is not in this record when either term of court expired.
224 That is a matter that is not in this record. I think the burden is on them, and it is one of those questions that does raise a question on it.

But apart from that, frankly we take the position—I will state frankly that I doubt very seriously the validity of that judgment or of the order of the year 1940, made in the absence of the defendant.

The primary thing in this matter is the capias ordered to bring him into court, and when that happened, that was just the same as, so far as the time period is concerned, if the action was taken on that date in October. I will state to your Honor that there are North Carolina cases bearing upon the propositions have I have submitted to your Honor.

The practice in North Carolina is different from other State courts in that parole may be granted for a much longer period than the term of sentence.

The Court. Will you say that again, please?

Mr. Williams. A parole may be granted for a much longer time than the period of the sentence.

I call your Honor's attention to the case of State against Yates, 183 North Carolina 753. This was a case where a man was sentenced to twelve months for violation of the prohibition law. That was in 1919. After he had served forty-two days of his term, the Governor paroled him upon good behavior.

In December, 1921, which your Honor will see is some time after he was sentenced in December, 1919, to a term of twelve months, and was after the sentence had expired, the Governor revoked the parole and ordered him brought back.

Mr. O'Connell. Of course, at this time I do not
225 like to interrupt, bnt this man here is not on parole, as is shown by the telegram from the Parole Commissioner.

The Court. I understand that. This is probation or suspended sentence.

Mr. Williams. I am going to argue analogous cases, as near as I could get them.

He raised the question that he could not be brought back because the term of his sentence had expired. The Supreme Court said no, that he could be.

"In other words, when such breach by the defendant was duly determined, and his conditional pardon thereby

avoided, the defendant at once became subject to rearrest, although the time for which he had been sentenced had expired. Any other process of reasoning would disregard the primary fact that the essential part of the sentence is the punishment and not the time when the punishment shall begin or end."

Now, if your Honor please, I guess it is not necessary for me to state here, as it is elementary law, that nothing could be done about the sentencing of this man. State against Cherry, 154 North Carolina.

I have a case, the State against Williams, 151 North Carolina, to show the purpose of this capias. This was where he relied upon the statute—where the defendant relied upon the statute of limitations. The Court held that where the defendant relied upon the statute of limitations, he was entitled to a nolle prosse with leave taken.

Later, within the time, a capias was issued by the court to bring him back into court. In that case they say
226 that the issuance of that capias stopped the statute of limitations and that he was within court within the time.

I have another case, which I think is even more pertinent to this question and shows the practice of North Carolina in these matters. This was the case of State versus Phillips. I shall state the facts to your Honor. This case is cited in 115 Southeastern 893. It is a North Carolina case and is also found in 185 North Carolina 614.

The facts in that case were these: A man by the name of Phillips was convicted in court and was sentenced. The dates are important, we think. He was convicted in March, 1922, for public drunkenness. He was sentenced to a term of six months on the Yancey County roads. Then sentence was suspended on good behavior. The judge wrongfully placed a provision in that judgment that if at any time Phillips should be found drunk, a clerk should issue a capias, and the court put the sentence into effect.

Later Phillips was found to be a public drunk, and the clerk issued a capias and imprisoned Phillips and put him in jail.

Phillips appealed to the Supreme Court in 1923, and the Supreme Court said that that sort of judgment was im

proper; that every man was entitled to a hearing on the question of whether his sentence should be revoked. Here is what the Supreme Court of North Carolina said: that although that sentence was improper and the court could not do it:

"This defendant has not been legally sentenced, though we will not discharge him, but instead will require
227 that he give a bond or recognizance in the sum of $200 for his appearance at the next term of the Supreme Court of Yancey County to have and receive such punishment for his offense as the Judge may impose and as law allows. The Judge will find the facts and decide accordingly."

That was a case where the six months had passed by, but the clerk had improperly sentenced Phillips, and Phillips took the case to the Supreme Court. The Supreme Court said it was not proper judgment; that the Judge should have passed on it. The suspension of sentence on the condition that he should not get publicly drunk was proper, but it was improper for the clerk to decide; the Judge should decide; and also he can come back more than six months afterward and impose it.

I call you Honor's attention to the fact that the bond given by the defendant in this case continued up to the time of final judgment. This man is still under bond in North Carolina. That bond is still—

Mr. O'Connell. I object to that and ask the Court to rule that the papers speak for themselves. I say there is no such thing in there and that his statement is deliberate, rotten falsehood.

Mr. Williams. It is not falsehood, if your Honor please.

Mr. O'Connell. Prove it.

Mr. Williams. The bond is not part of the record.

Mr. O'Connell. This man is not testifying. I say let him bring it in and show it to us. I say it is a deliberate falsehood.

228 Mr. Williams. It is not a falsehood. It is not part of the record. All our bonds are statutory bonds. I think the decisions of North Carolina construe our bonds. I can state to your Honor that these are statutory bonds, and they continue, even under suspended

sentence or prayer for judgment, right up to the time of final judgment.

This is a statutory bond. They deny it, and we have decisions of the Supreme Court of North Carolina construing that kind of bond, and holding that it is a continuing bond, even under suspended sentence or prayer for judgment, right up to date, so he has breached his bail bond. That is one of the provisions of extradition. He has breached his bail bond by failing and refusing to come into court when the capias was issued and he was ordered to be brought in. He is still under that bond.

There is just one other point. Your Honor asked me about this matter of good behavior. With this one case I shall have finished.

In North Carolina good behavior does mean behavior in accordance with law, but it is not necessary that an indictment be issued in order for the Judge to call the defendant before him to impose sentence or to revoke the suspended sentence, but it is for the Judge himself to do that. I have a case in which that was actually done without any indictment.

Mr. O'Connell. What is the citation?

Mr. Williams. I am going to give it to you right now. It is the case of State against Tripp, 83 Southeastern 630. It was done by an inferior court.

229 "D. L. Tripp was sentenced to incarceration after a prior sentence had been suspended during good behavior, and, the judgment having been affirmed by the superior court, he appeals."

"On the hearing, it was made to appear that, on December 22, 1913, defendant was convicted in two cases in recorder's court of Durham, on warrants charging him with unlawfully selling spirituous liquors."

I might say to your Honor that a recorder's court there is an inferior court corresponding to police courts in other places.

"In one case, he was sentenced to pay a fine of $100 and costs, which was complied with. In the second case, the following entry was made:

'The defendant comes into court and pleads not guilty. After hearing the evidence in this case, it is adjudged that

the defendant is guilty, and the judgment is suspended, the defendant to give bond in the sum of $100 to appear at this court on the first Tuesday on each and every month for twelve months and show that he is of good behavior, and not handling spirituous liquors unlawfully.' "

Then it appeared that the recorder's court found afterward that Tripp had been violating the laws and brought him into court and found, as a matter of fact, that he had been guilty, and revoked the suspended sentence.

It is for the Judge to find the facts in his own discretion, and when he shall find the facts in his own discretion, from sufficient evidence upon which to base his judgment for revocation of suspended sentence, his discretion cannot be inquired into.

Mr. O'Connell. Do you mind giving us the facts in that case?

Mr. Williams.

"Thereupon follows a detailed statement of facts as found by the recorder showing, since his conviction and before the hearing, a course of continued and repeated disorderly conduct on part of defendant in the City of Durham, including two violations of the criminal law (neither of these, however, being for unlawfully selling liquor), and the record, on the hearing before the recorder, then continues:

'That the conduct of the defendant has been subversive of good morals; that the defendant has not been of good behavior since December 31, 1913, and has violated the terms and conditions upon which said judgment was suspended. Whereupon the judgment of the court being prayed, it is ordered, considered, and adjudged that the defendant be sentenced to serve a term of six months in the common jail of Durham County to be assigned to work on the public roads of Durham County.' "

Tripp appealed from that decision, and it is in that decision that the court says, among other things:

"In the case before us on the propriety of this sentence, the matter is necessarily and properly referred, in the first instance, to the legal discretion of the recorder and,

231 no appeal being provided for, the question would ordinarily become one for review by the superior court only in case the recorder would refuse to hear evidence on the subject or, having heard evidence, would commit manifest and gross abuse of discretion in imposing the sentence upon defendant, either because no violation of the condition had been shown, or because the punishment was so severe as to be out of all reasonable proportion to the offense. And no such case is presented in this record. Here the recorder has heard the evidence, and without referring to his findings in detail, we are all of opinion that they fully justify his conclusion that 'defendant has not been of good behavior since December, 1913, and has violated the terms and conditions upon which said judgment was suspended.' And there is nothing in the sentence imposed to permit or call for our interference as a matter of law.''

I stated to your Honor that it was for the Judge to hear in his discretion, and it just like all those discretionary matters where there is substantial evidence. The ruling of the Judge is final except in matters where there has been gross abuse of discretion.

I have other cases in which that is referred to, but there is a case where a Judge took it on his own motion and decided the question because reports had come to him that there had been a violation.

That is our position in the matter very frankly; namely, that this capias was issued within the time, that
232 that puts the defendant there, and that he should come in.

Mr. O'Connell. Would your Honor take a five minute recess, please?

The Court. Very well.

(At this time a short recess was taken. The following then occurred:)

233 (The proceedings were resumed at 11:30 o'clock p, m., at the expiration of the recess.)

The Court. Proceed.

Mr. O'Connell. May it please the Court, first I want to thank you for the attention that you have displayed in hear-

ing this matter. I know that usually habeas corpus proceedings do not take this long, they are not of this type.

At the outset I would like to pay my respects to Mr. Conliff for his very able presentation of the case, and I also want to pay my respects to Mr. Williams.

What I would like to inquire is: What happened to the mysterious gentlemen who sat opposite Mr. Williams, who was presented to this Court as the representative of the State of North Carolina and who came up here to assist in bringing Pelley back.

I mention these things just to show the Court the background of what has been going on in this case, and to give you a complete picture of it, to which I think you are entitled.

What happened when this man was asked, "Where did you get your money for your private compensation?"

The Court. Let me interrupt you, Mr. O'Connell, to say that I ruled that the question of motive is not in this.

Mr. O'Connell. I am going into it to show his absence from the Court here.

The Court. I am not concerned with that.

Mr. O'Connell. I am, and I want it in the record.

The Court. You have presented that, so go ahead
234 with your argument.

Mr. O'Connell. Where is that man, why isn't he here?

He isn't here because he is afraid of the questions that might be asked him.

The Court. Don't spend any more time on him.

Mr. O'Connell. I want to call your attention to the telegram that is in the record from the Parole Superintendent of the State of North Carolina saying that Pelley is not on parole, and that that office is not concerned with Pelley.

The able prosecutor, in his astute manner and with his astute friend is trying to confuse **your Honor.**

Here is a gentleman, a most important gentleman, in North Carolina, if you believe the act of the Judge, in appointing a special prosecutor, but before when extradition was reviewed and habeas corpus proceedings instituted, never has he sent a special representative to bring a man back over the border.

Yet, this time he has sent this man from the Smoky Mountains, this man from the country of the chain gang, he is up here to bring Pelley back.

The chain gang; that thing that is only for negroes and Yankees, that is common knowledge.

Your Honor should see that this whole case is not presented to you in good faith. You see that one of our representatives, Mr. Conliff, of all people, says to your Honor that you can't inquire into this, you can only inquire as to whether this man is a fugitive or not, you can't go into anything else other than what was gone into before Chief Justice Wheat, and when he says that he is insulting your intelligence.

The Court. No, he is not, he is just stating his
235 version of the law.

Mr. O'Connell. If that were true, you couldn't get anything out of this--

The Court. Don't confine yourself to what I have ruled out of the case.

Mr. O'Connell. I am entitled to give what I consider to be relevant.

Your Honor didn't interfere with Mr. Conliff or Mr. Williams when they presented their argument, and I submit that I am entitled to make mine uninterrupted. I insist on your hearing me.

The Court. I am perfectly willing to listen to you, but confine yourself to those things that have not been ruled out of the case.

I ask you to stop arguing these matters upon which I have ruled, and if you continue any further I shall have to find you in contempt and punish you for it.

Mr. O'Connell. That is within your Honor's discretion.

I say that you have no right to threaten me with contempt. If I am in contempt, your Honor will take the proper action.

I am respresenting my client to the best of my ability, and I say that when the other side makes the statement that you cannot consider anything that was not considered before Chief Justice Wheat, that statement is an insult to your Honor's intelligence, because if that were so, you would have none of these hearings.

The Court. Will you permit me to interrupt you and to tell you what I am considering?

There is the question of identity, the question of identity which I understand is admitted; the question of whether he was a fugitive from Justice; and whether or not
236 the papers substantially set that forth.

Mr. O'Connell. But your Honor heard these gentlemen, they took almost all afternoon and most of this morning —

The Court. I am glad to hear you if you confine yourself to those questions.

Mr. O'Connell. I know that your Honor believes me when I say that I have the deepest respect for your Honor, but I respectfully differ with your Honor on those points.

The Court. They have been ruled on, continue. I will hear you on those points that are before me.

Mr. O'Connell. I call to your Honor's attention the fact that not one case presented by either of these astute gentlemen, not one case, not even one from the representative from the Smoky Mountain State, member of the Bar of North Carolina, for 36 years, not one case has been referred to where a man was wanted for imposition of a suspended sentence. This gentleman says that it is within the Court's discretion.

If that be true, keep in mind that Pelley never was ordered to report to anybody, he is not in the custody of anybody, he wasn't ordered to stay in the State of North Carolina. There is the picture.

The Court says to Pelley, "Pay off the fine, pay the costs of $1800, and I will suspend the sentence on the other count, and you can go your way, just behave yourself, and as long as you don't violate the laws of the State of North Carolina, we won't bother you.

The Court. That was the deal, and Pelley accepted.

The time for taking an appeal has elapsed, and the man who says in his deposition, "The information that
237 I got is in the bosom of the Court, and you cannot force me to reveal it."

That braggart, that prosecutor, says, "I don't know where Pelley is, I don't have to show him the law, I just summarily order him back here."

For what purpose? To be accorded a hearing, and the man from North Carolina says that every man is entitled to a hearing.

Look at the purpose for which he is being given a hearing.

I quote from that order, and I will ask your Honor to read eleven lines from the bottom, beginning, "The undersigned Judge."

This is the purpose of bringing Pelley back to North Carolina.

The learned member of the Smoky Mountain Bar says he is to be brought back for a hearing.

"The undersigned Judge issued a habeas for the arrest of W. D. Pelley, to be brought before the Court for the purpose of imposing sentence."

Not to give him a hearing, but to treat him like a dog, put him on the chain gang.

I say again, your Honor, that you have the picture there. You have the statement of Mr. Dies, and other papers that are in evidence, what he is going to do, and we have the action of the Judge.

Bring him back in for hearing? No, bring him back for a sentence.

This gentleman says that you can't do it, and you can't, and then he cites you the case of North Carolina against Tripp, and he says that that is in point. That case
238 is not in point, and I say it is another deliberate attempt to mislead your Honor.

That case concerned a nol-pros, and in nol-pros under this jurisdiction we have the same law. That was the case of a drunk, and a man who was disorderly, and he says that there must be sufficient evidence on which the Court shall base judgment. He is not brought back for sentence, there must be sufficient grounds for sentence. In that case there were two prior convictions for disorderly conduct.

I say it is tragic that we must go through this farce.

Not one case has been cited by Mr. Conliff or by Mr. Williams—and I know that they burned the midnight oil last night, trying to find out the right of a Judge to act without showing anything.

Your Honor recalls the refusal to reveal what this information was for wanting Pelley back.

Not one case has been cited to justify such action.

I cited a case yesterday, which temporarily seems to slip my grasp, I believe it was 89 U. S., in any event, the language of the Court was that the revocation of probation —and this man is not even on probation.

The Court. You mean the Van Riper case?

Mr. O'Connell. Yes, that he shall not be made to depend on the whim or the caprice of any Judge.

Who is this man, is he God? Who is this man to say that five years later, after the time has elapsed, "I will bring him back, and, further, don't ask me why." Those were his words.

"Your court has me under oath, and you want to know why I want him back. It is not any of your business,
239 and no power on earth can force me to reveal it."

Extradition and habeas corpus cases, in connection with it say this, that there must be evidence of substantial conviction, and these gentlemen say that there is an indictment on which there was a trial and judgment, so that for the purpose of extradition, it is no longer an indictment.

Your Honor has before you the North Carolina Code, which I cited, which refers to the length of time when sentence can be suspended.

Can the Court continue it for five years? They say no. Their Code doesn't say that the Judge may continue it, it says that the Judge cannot continue it longer than five years.

If he extends it, the time of the extension must be within that period of time.

They come in here and they give your Honor a lot of phoney cases, not one of which is in point.

I think it is confused, I will say it for the sake of argument, although I do not concede it, actually, suppose that five years was still in effect, and wouldn't expire until two years from now, and Pelley is out on good behavior, no restriction on his living in the state, the condition being only that he be on good behavior. Suppose further that Pelley is out in the middle west; when does he become a fugitive from the State of North Carolina?

Is it when he violates the law of the State of North Carolina? That is what the Supreme Court of North

Carolina has held is necessary to violate the good behavior provision. When does he become a fugitive?

This prosecutor gets on the bench, and says that he
240 wants to be fair and impartial. He is not the Judge in this case, he is not concerned with Pelley's good behavior.

He says, "I will bring him back, just by my act, I will issue a capias, without anything upon which to base it, he is a fugitive."

I don't think you have ever heard anything more preposterous in your life.

Now, what about those depositions?

The Judge says, "I won't hear it, knowing my feelings in the matter." He is going to be fair in the matter, he was the one who prosecuted the case originally, he is going to let another Judge hear the case.

He insults the intelligence of the Court.

I want to call the Court's attention to what I have previously contended, we have in evidence a copy of the order directing the Sheriff of the county to seize the records of Pelley. That is in evidence.

That order, I say, violated the laws of the State of North Carolina, because the North Carolina criminal Code makes it a penal offense for anyone to issue a search warrant without an affidavit to back it up, and that is what has been done in this case.

That evidence is still in the custody of those county authorities, and, if your Honor would care to have me read it, I will read that provision of the Code.

The Court. I don't think that helps.

Mr. O'Connell. It is Section 4, 530, paragraph 1 of the North Carolina Code.

Your Honor would not permit me to bring in the
241 testimony of Dies, Parker, Judge McMahon, ex-Judge Curran, and others, showing that there was a conspiracy to railroad this man. That has been excluded, but I reserve my right to appeal.

Now, we come to another matter which has been urged on your Honor, that Pelley is under bond.

I defy Mr. Williams to go through the records he has, and the records speak for themselves, and see if this man

is on bond, and I will give him a one-thousand dollar bill right here and now if he can show any such paper in this case.

Pelley is not on bond, that is a deliberate false representation to your Honor by a man who has been accorded the hospitality of the Court, permitted to come in where he has no business to be—we don't know who his bosses are, whom he represents. He says that it is the State of North Carolina, but we say it is someone else.

The Court. The record does not show that he is under bond, so I will disregard that.

Mr. O'Connell. Now, I am not going to take much more of you Honor's time.

I don't think this merits any extended argument on my part.

They have floundered all over the lot; they have not put one case in that has been in point; and I want to call your Honor's attention to the statement made by learned counsel from the Smoky Mountain State, "I will concede that the order of February 19 extending the five years is of no effect."

If it is of no effect; why did the learned Judge sign it, and why is it a part of the record?

He urges that the capias stopped it, yet the Judge signed it.

242 He says that the Judge demands Pelley's presence for a reason that he refuses to divulge.

Does he say that he didn't know the law, doesn't know the law now, or didn't know the law five years ago.

Now, I ask you, "Isn't that a confession?" Isn't it a confession when he says the capias didn't extend the running of the time?

He has not offered one case, and he has been a member of the Bar of North Carolina for 36 years, very learned in the law, and yet in this case he has offered you not one case that is in point with this one, and he says that the issuance of the capias stopped the running of the time, and then that he can go on for five years. Where did he get the authority for that?

Can they get around the law where Pelley is brought and say, "We will stop this thing from running, I will issue a capias."

By what authority? Nobody gave them that right.

They must have information sworn to, an affidavit, reliable information.

That Judge, when questioned, about where he received that information upon which he based his issuance of the capias said, "Brother," these are his exact words, "that rests within the bosom of the Court, and neither you nor any other power on earth can force me to reveal it."

This man concedes that he has to have something on which to issue the capias, and yet he attempts to confuse the Court.

I won't take any more of your time, Your Honor, because I think the Court sees the picture here, and I will submit the case without further argument.

243

Mr. Williams. I have the record as of January 23rd, showing that the defendant is under bond, and that it continues under the same bond. That is under date of January 23, and it has been offered in evidence.

The Court. 1935?

Mr. Williams. Yes.

The Court (examining the paper in question). That does show, Mr. O'Connell, that the defendant is to remain under bond, and this is the order of January 23rd.

Mr. Williams. Yes, sir, that is the only reference to it, when the prayer for judgment was continued.

The Court. Does that continue the bond with it?

Mr. Williams. Yes, until final disposition of the case.

Mr. O'Connell (examining the document in question). Now, here, again, is that attempt to smoothly deceive your Honor.

This order is dated Wednesday, January 23, 1935, and that is before sentence was imposed on this man.

The Court. Yes, it is continued until the February term.

Mr. O'Connell. Yes, and not to keep him under bond until February, 1940.

The Court. I understood Mr. Williams to say that under the North Carolina law that continued the bond.

Mr. O'Connell. Without any order of the Court?

Mr. Williams. Yes, and I have the law on it.

Mr. O'Connell. Let me see it.

Mr. Williams. I have it here.

The Court. I think I will proceed on the theory that the bond terminated when he was released.

244 Mr. Williams. Very well.

The Court. Now, gentlemen, are you finished?

Mr. O'Connell. I would like your Honor to consider this —I do not intend to present it in my argument—to consider, in reaching a conclusion as to this case, that the depositions taken in North Carolina.

The Court. I might say about that that I have read those depositions, and I have indicated opposite most of the objections my ruling and, so, if it is satisfactory to each side, they may take exception where my rulings are adverse.

Mr. O'Connell. Yes.

Mr. Conliff. Yes.

The Court. So this will be a part of the record, and my ruling is indicated by the word "overruled" or the word "sustained" opposite the objection.

Counsel has indicated that some midnight oil has been burned last night, and that applies to the Court also.

I have listened to the argument here, and it has been very helpful, and I have read the depositions and the cases cited by both sides.

I have reached the conclusion that I should discharge the habeas and remand Pelley to the custody of the Marshal.

I understand that there are three questions open; first, is the question of fugitivity, then the question of identity and then, finally whether or not the papers contained in the extradition file substantially charge violation of the law.

I have taken these three questions up, and I understand that the question of identity is admitted.

Mr. O'Connell. Yes, your Honor.

245 The Court. And, on the question of fugitivity the Supreme Court has held that when a person is in the state at the time of an offense, and afterwards disappears for any reason, and if he is asked whether he is desired by the authorities in the state, then he is a fugitive. That ruling is binding on me, and I think he was a fugitive at the time the demand was issued, and it would seem to me that he became a fugitive on October 19, of last year when the habeas was issued.

Now, as to whether or not the extradition papers substantially charge the violation of the law, the records show

that regarding the trial in 1935 he was convicted on two offenses, sentence was imposed on one and suspended on certain conditions for five years, and that on the other sentence wasn't imposed, but prayer for judgment was granted, which continued for five years, and expired some time around February, 1940, whether it was on the first day or the last day of that month of that term I don't think is material.

The Supreme Court of the United States has held in matters of continuance that, including the statute of limitations, that is not to be considered by the Governor on extradition on habeas corpus proceedings after extradition.

It seems to me that under the second count, whether or not the Court still has the authority to impose sentence, on that count, that is analogous to the statute of revocations, at least it is a matter of defense.

Now, on the question of the first count, on which judgment was imposed, and execution suspended, it is admitted that he has performed some of those conditions, such as paying the fine, and it is admitted that he has performed on good behavior. That raises a question of fact as a
246 defense in the trial court, it is not a matter which I can consider here.

So, for those reasons I have reached the conclusion which I announced.

Mr. O'Connell. At this time I note an exception to your Honor's ruling and announce my intention to file a motion for rehearing, and, in the event that that should go against it, I ask your Honor to set an appeal bond or to continue Pelley on the bond set for him now, or to set an appeal bond.

Mr. Conliff. If the Court please, of course we can have no objection to the defendant's appealing and getting out an appeal bond, but, in view of the fact that the Court down there suggested a $10,000 bond I request that the bond on appeal be the same sum.

The Court. What do you say to that?

Mr. O'Connell. That was ruled on before Judge Letts and Judge Casey.

The Court. How much was it?

Mr. O'Connell. It was $10,000, reduced to $2500.

The Court. I think the present bond is sufficient.

Mr. Conliff. That is a new bond now in the sum of $5,000.

The Court. $5000?

Is it necessary to renew it?

Mr. O'Connell. Not until your Honor rules on the rehearing.

I don't know whether your Honor, in view of the facts that this is an extradition proceeding, would like to up the bond or not.

The Court. I don't think it is something to be argued here. I will consider it very carefully.

247 Mr. O'Connell. I am not arguing it.

I don't want to forfeit any of the rights of Pelley by not arguing the motion for a rehearing.

Mr. Conliff. The defendant is to be remanded to the custody of the Marshal until he makes his appeal bond for $5,000?

The Court. Must it be a new bond?

Mr. Conliff. Yes.

The Court. All right.

Mr. Conliff. That is all right.

The Court. Do you want any findings of fact?

Mr. O'Connell. Yes, I would like to have that.

The Court. Submit it so that I can have it by Monday, the first draft, and exchange drafts.

Mr. O'Connell. All right.

Mr. Conliff. Very well.

(Thereupon at 12:05 p. m., Friday April 5, 1940, the hearing was concluded.)

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248 *Transcript of Proceedings*

Filed June 28 1940

* * *

Washington, D. C.,

Thursday, April 18, 1940.

The hearing of the above-entitled matter was resumed before Associate Justice Jesse C. Adkins in Civil Division

No. 1, at 3 o'clock p. m., on the petitioner's motion for rehearing.

Appearances:

On behalf of petitioner:

T. Edward O'Connell, Franklin V. Anderson.

On behalf of United States of America:

John C. Conliff, Assistant United States Attorney.

Proceedings

The Court. Very well, gentlemen. Yes, Mr. O'Connell.

Mr. O'Connell. If it please the Court, I do not intend to go into great detail with respect to the different matters offered to your Honor in the hearing of this case. I think the case is of such recent occurrence that most of the matters with which we are concerned are fresh in your
249 Honor's recollection.

I should like to say to your Honor that this whole case, I believe, boils down to the question of whether or not a Court which suspends the imposition of a sentence for a certain period of time may within that period of time, without offering any reason for so doing, issue a capias for the return of the defendant for whatever action the Court sees fit to take in his case.

I think that is the substance of your Honor's holding: that they can do that. If I am mistaken in that assumption, I shall not be a bit offended to have your Honor correct me.

The Court. I think I have done that; yes.

Mr. O'Connell. I should like to say by way of comparison that in the usual extradition case and in a hearing to review that, where extradition is ordered, the Court as a rule will inquire to see whether or not the indictment is a real indictment and contains a charge of a substantial crime.

As I understand, Mr. Conliff bases his whole argument on the statement and on his conclusion of law that the original offense is the one which is sufficient to justify the return of the alleged fugitive. However, in this case, where there has been no showing of any misbehavior, no specific act either alleged or attempted to be proved, whereby Pelley

violated any term in which his sentence or his prayer for judgment was continued, there is no crime charged.

We say that the situation here amounts to this: This Court says we cannot go into the question of whether or not he has violated his parole or whether he has failed to comply with the terms upon which is prayer for judgment is continued; that is a matter for the North Carolina
250 Court. We are to presume that the North Carolina Court will accord this man a fair and impartial hearing, under the Constitution; but to assume that position, without inquiring whether or not the alleged fugitive is substantially charged with a crime, would be in an ordinary habeas corpus hearing to say, "Well, we will not concern ourselves with whether or not this is a valid indictment, whether or not there is a substantial charge of crime. We will send this man back; and if those facts be true, the North Carolina courts and judges are fair and impartial and intelligent, and they will recognize that fact and, accordingly, they will discharge the defendant."

However, if your Honor please, should the burden be on the defendant, to be dragged from one state to another, when by scrutinizing the papers themselves we can see that the man is not charged with a substantial crime?

Of course, it is well known and I know we will all concede this—both your Honor and Mr. Conliff and myself—that this is an unusual habeas corpus proceeding. The usual habeas corpus proceeding reviewing extradition is one in which a fugitive is sought to be brought back for the purpose of sending him to trial on a certain specific charge. On the other hand, in this case the alleged fugitive has been tried; a certain sentence has been imposed on him; that sentence has been on one count suspended and continued on his good behavior. On the second count the prayer for judgment continued five years.

Is this Court not bound to say that both of those counts are to run concurrently? Costs in the case have been paid on all counts. This defendant has paid the costs as to the second count, on which the prayer for judgment was continued.

251 Your Honor will recall that I read a case to you from 99 U. S.—the Van Riper case—in which the Court of Appeals said that provision and parole are not

to be exercised in such a manner that they may be revoked at the whim or caprice of the judge.

When that court continued the prayer for judgment for five years, was it not understood that the condition upon which that prayer was continued was synonymous with and concurrent to the condition attached to count number 1—and when they said "Pay a thousand dollars; go forth and behave yourself; do not violate the law"—that is behaving yourself—"and we will live up to our bit of this covenant. If you do those things—pay the thousand dollar fine and the costs and if you behave yourself—we will not bring you back on this prayer for judgment."

Doesn't it boil down, when the North Carolina authorities ask Your Honor to return a fugitive, to having those North Carolina authorities say to Your Honor "This prayer for judgment was continued at the same time when the sentence on the first count was suspended. The conditions attaching to the suspension of sentence and the continuance of the prayer for judgment are synonymous: good behavior".

Now don't they owe it to Your Honor to say, "This man has violated the terms of this in such a manner as to constitute him a fugitive"?

I believe it will be conceded that unless and until Pelley violates the terms of that suspended sentence and the conditions upon which the prayer for judgment was continued,

not until that moment does he become a fugitive;
252 and I say that due to the fact that the set-up in this case is different from the average habeas corpus case respecting extradition, the duty is upon the North Carolina authorities to come in good faith and say to Your Honor, "We want this man back. We want this man back because he has done this certain act. He is charged in the State of North Carolina with a law violation. Under the rules laid down by the North Carolina Supreme Court, that is ample, sufficient, and bona fide ground to revoke this suspension of sentence and to impose sentence under that continued prayer for judgment."

They have not done that. They have not even said to Your Honor that this man has done any one, specific thing which would constitute him a fugitive.

Of course, in my argument to Your Honor I did mention certain things which Your Honor instructed me were to

be excluded from the case; and I think Your Honor will agree with me that at no time have I ever intended any disrespect. It may be that I got so zealous and so heated up because of my interest in the cause that I might inadvertently and unconsciously—but not with any intent to be disrespectful to you—have done or said certain things which should not be said.

I did in the heat of my argument mention things which in good faith, I think, should be considered in the case. Your Honor has said that the question of the compensation of these private prosecutors, the absence of the Governor, and all those things you ruled on, were not proper for consideration here, and that, therefore, I was to confine my argument only to what you had ruled was germane to the issues in the case.

253 I believe Your Honor stated—and I believe the record shows—that we are confined to practically the same issues and the same findings and the same scopes of inquiry on habeas corpus reviewing extradition as the Governor was when he heard the original extradition case: that is, the question of identity—conceded; the question of fugitivity—denied by the defendant and found to be a fact by Your Honor; and the question of whether or not he was charged with a substantial crime.

The Court. I think those are the questions that are before me. I think there is some slight difference between the questions that might be before the Governor and before the Judge.

Mr. O'Connell. There is a letter in the record in which the Governor says that he knows nothing of the case, whatsoever. We did offer it to Your Honor, and we offered him, in the best of faith. He was subpoenaed here, in the jurisdiction of this Court. It might be embarrassing and a little bit inconvenient for him to give up the affairs of state and report to this Court; but in view of his statement that he knows nothing about the case, I believe we should be permitted to inquire with respect to why he affixed the seal of the State of North Carolina and why the affirmation that he used in these papers constituted a charge of a substantial crime.

I offered that most respectfully. Your Honor has ruled that it is not pertinent.

The Court. Just let me say that I understand, of course, that you are acting in the best of faith; as you say,
254 you get in the heat of concern with the interests of your client, and you find a difficulty in having a view different from the one you have.

However, I think those questions are clearly set forth by the Supreme Court. Questions regarding the attorney and the prosecuting attorney are all excluded from consideration; the Supreme Court decided that a great many times.

Mr. O'Connell. I should like to say that we did not offer that evidence to show motive. It could be called motive; but this is the reason why I wanted to introduce especially the testimony of Dies: There is in the record—it has been ruled that it is not pertinent, by Your Honor—a copy which we offered of an Asheville paper quoting Congressman Dies as saying some weeks before this capias was issued, that he,—Dies—was going to take steps to have this capias issued.

The reason I wanted to have Dies come in here and show that that was a fact—and we could have shown it to be a fact that he had succeeded in procuring the issuance of this capias—was not to show motive but to tie this case in with the case of United States against Van Riper, wherein the United States Supreme Court said:

"Such things shall not be done at the whim or caprice of the Judge."

In other words, the Court must keep faith with any man who pays a fine, pays the costs of court, and behaves himself thereafter; and it is not the privilege and not within the discretion of any judge to issue a capias for that man, whimsically and capriciously.

When we can show that the capias was issued at
255 the whim and the caprice of the judge, then I think Your Honor would be bound to say that this man was not a fugitive, because of the fact of the issuance of the capias at the whim or caprice of that judge, which action was brought to you by Congressman Dies.

If we showed that, then I think there would be ample justification—and I believe it would be almost made mandatory—for Your Honor to say, "This man is not a fugitive,

and I am not going to order him back to any place in the United States because some judges sees fit arbitrarily to order him back."

As Your Honor will recall in the record—we took the deposition, and it is not stricken out—when that judge, down there, was asked why he issued the capias, he said, "That is none of your business. That rests within the bosom of the Court; and no power on earth can force me to reveal where I got the information upon which I issued the capias."

When that judge takes that attitude, I think Your Honor can certainly say to him, by your action in the case, "If you want some man in good faith brought back from the District of Columbia, tell us why; and tell us what he has done to offend your laws. Tell us that, and say that you are acting in good faith, and we will summarily order him back."

We must also keep in mind that the judge who suspended sentence on Pelley and who continued the prayer for judgment is still on the bench in the Superior Court of the Nineteenth Judicial Circuit in North Carolina. He is still there —that man with whom Pelley entered into a covenant, and who entered into a covenant with Pelley, to act in good faith. He has never ordered Pelley brought back.
256 The prosecutor, since ascended to the bench, has ordered him back.

I say that the ruling in the case of Johnson against Zerbst, 304 U. S., makes it almost mandatory on the Court to inquire—so that substantial justice may be done—whether or not it requires sticking to the letter of the record or taking in extraneous evidence, considering collateral issues if they go to the meat of the case: Is substantial justice being done by ordering Pelley back into North Carolina?

I shall not take any more of Your Honor's time. I want to say, in closing, that we cannot be bound by the presumption that if he goes back there, he will get a fair trial. Ordinarily that would be so, but in this case the authorities of North Carolina know that the people of the State of North Carolina are hardened against him.

The Supreme Court has said that before a suspended sentence can be charged, there must be a violation of North

Carolina law. The North Carolina authorities know that; and we have no right to assume that by sending him back the authorities there will reverse themselves and act in good faith, where they have not attempted to act in good faith up until now.

That is all I have to offer.

The Court. It seems to me that what they have done there is to endeavor to get him into Court, so that they may decide the question of whether or not he should be sentenced. I think that the decision I reached before was correct; so I overrule this.

Mr. O'Connell. Your Honor will allow me an exception?

The Court. Yes.

257 Do you have any findings of fact

Mr. O'Connell. I have many findings of fact. I wanted to put them in proper order, and not repeat myself or force Your Honor to review the same findings, put in different form.

The Court. When can you let me have them? I should like to fix a definite time.

Mr. O'Connell. I shall have them in to Your Honor by Monday afternoon, if that is agreeable.

The Court. Monday afternoon?

Mr. O'Connell. Yes.

The Court: That is definite, is it?

Mr. O'Connell. Yes, Your Honor.

The Court. All right. If they are not in by that time, I will assume they are not coming.

Mr. O'Connell. Yes, sir.

Mr. Conliff. If Your Honor please, with respect to your rulings on the depositions taken in Asheville, I notice in the copy where you made the pencil notations with respect to which objections were sustained and which were overruled, that apparently you did not make any notation as to the deposition of Judge Welles, starting on page 81 of the depositions.

As far as the Government is concerned, I think it is immaterial; but I did not know whether Mr. O'Connell thought there should be some rulings as to Judge Welles' testimony or not.

Mr. O'Connell. What page is that?

Mr. Conliff. Page 81.

Mr. O'Connell. No objections.

The Court. Which one did I mark—the original?

258 Mr. O'Connell. That is the one you marked, Your Honor.

The Court. On what page does it start?

Mr. Conliff. Page 81.

The Court. Well, if you do not think it is material, Mr. Conliff, then let it be understood that they are overruled? Is that satisfactory to you?

Mr. O'Connell. I think you ought to rule on each one; because Judge Welles is the present Solicitor of that Circuit; and we brought to Your Honor's attention the fact that he himself had stated publicly that there was nothing upon which to justify bringing Pelley back, because he had not violated any law, to the Solicitor's own personal knowledge.

The Court. On page 80, I will sustain the objection.

Mr. O'Connell. Page 81, is that?

The Court. 82.

Mr. O'Connell. Of course, it is understood that there is an exception taken?

The Court. Well, now, where he undertakes to tell his recollection of a verdict, we have that verdict, and so forth; and what difference does it make what his recollection is?

Why do you bother me with ruling on objections of that kind? Do you want to stand on all those objections with respect to his recollection of what the verdict is?

Mr. Conliff. No, if Your Honor please. The only thing I am objecting to is where he is testifying as to some background for it. I do not care about his recollections.

I think on page 84, where they asked him, "During the time that you served as Solicitor and Judge, state

259 whether or not you had much experience in suspending judgments?"—I think that is immaterial.

Mr. O'Connell. It is a question of whether or not this is bona fide.

The Court. Well, I will overrule him on 84; and I will proceed to rule on the others.

I will overrule the next one, for whatever it is worth—two on 84—and I deny the motion to strike it out.

Mr. O'Connell. On page 86, Your Honor, in view of the fact of a habeas corpus regarding a law of a foreign juris-

diction, that is most pertinent to the rules of revocation of probation, and so forth.

The Court. Well, I will overrule the objection on page 86 and at the top of the page—overruled—and on page 87, overruled.

I overrule all those on that page.

I deny the motion on page 88. I overrule the others on that page.

Mr. Conliff. If Your Honor please, with respect to that paper, that was not in the requisitioned papers. That was not a part of the official record of the case.

The Court. I understand. That is the report of the statement which the Judge is said to have made.

Mr. Conliff. I see.

The Court. At the top of page 89, the objection is denied and the motion is denied.

I will sustain the objection to the offer of the paper in evidence.

Mr. O'Connell. Is that at page 90?

260 The Court. That is on the bottom of page 89.

I will overrule the one at the top.

I will deny the objection to the petition at the bottom of page 90.

I will overrule the objection at the bottom of page 91; and I will deny the motion at the top of page 92.

I will overrule the objections at the bottom of that page.

All right.

Now I am fixing this time for the filing of these findings with me; because I want to act on it before it is altogether gone from my memory.

Have you had the argument transcribed?

Mr. O'Connell. Yes, Your Honor.

The Court. Will you let me have a copy of it?

Mr. O'Connell. A copy of my argument here?

The Court. No, I do not mean this. I mean the argument before this or the testimony before this. Have you had it transcribed?

Mr. O'Connell. It is being transcribed; but I do not know whether Mr. Conliff is asking to have it.

The Court. If you are not having it transcribed, that is all right.

Mr. O'Connell. I am having it transcribed.

Mr. Conliff. So am I.

Mr. O'Connell. Mr. Conliff is having it transcribed, too. I shall be glad to lend you my copy, if you wish.

The Court. Well, so that I shall be in a better position to rule on your findings, if you will let me have a copy of of the record, that will be helpful. I suppose you
261 intend to prepare an order having the appeal run from today?

Mr. O'Connell. Yes, Your Honor.

The Court. Then will you prepare an order denying his motion for rehearing?

Mr. Conliff. Yes.

Mr. O'Connell. I do not like to take Your Honor's time: but there are some more objections that Mr. Conliff is interested in, on page 95.

Mr. Conliff. I think Your Honor stopped at page 93: but there was an insert there.

Mr. O'Connell. It starts at page 94.

The Court. All right; I shall sustain the one on page 95.

I sustain the one on page 96.

I grant the motion on page 96.

I sustain the one on page 97; I sustain all of those on page 97.

I grant the motion on page 98; I sustain the one on page 98; I grant the motion to strike, at the bottom of page 98.

Well, on page 98 he is testifying as to his view of the law. Judge Welles testified about that.

Mr. O'Connell. It is a good statement of the practice there, with regard to the suspension of sentence.

The Court. Well, I am trying to rule out any discussion they had about what the sentence would be. A sentence speaks for itself.

Mr. O'Connell. Yes, I see that.

The Court. But where he undertakes to—the first objection on page 98 is overruled. The motion to strike is denied.

262 The motion on page 99 is denied. I overrule the next objection.

I deny the motion to strike.

I sustain the last objection.

I grant the motion to strike, on page 100. I sustain the next objection. On page 100 I sustain the objections and grant all the motions to strike.

On page 101 I sustain all the objections and grant all the motions to strike.

The same ruling on page 102.

The same on page 103.

Mr. O'Connell. Is that to all objections and motions to strike?

The Court. Yes.

The same as to page 104.

Page 105, sustained.

The same as to page 106.

Now I think I have covered them all, have I not?

Mr. Conliff. Yes. When you say "the same as to page 106", does that apply to the general objection at the bottom of the page, if Your Honor please? That is a rather comprehensive one, I thought.

The Court. I will not pass on that.

Mr. O'Connell. You cannot, because Your Honor sustained some.

Mr. Conliff. Yes.

The Court. All right, gentlemen.

(Thereupon, at 3:40 p.m., the hearing was concluded.)

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263 *Affidavit of Detective Sgt. Guy Rhone*

Filed July 30 1940

* * *

CITY OF WASHINGTON
District of Columbia, ss:

Guy Rone, being first duly sworn on oath, deposes and says: That he is now a Detective Sergeant in the Metropolitan Police Department of the District of Columbia assigned to the Detective Bureau; that he has been on the Police Force since 1914, continuously; that on the 10th day of February, 1940, he arrested one William Dudley Pelley on a fugitive warrant issued by Judge John P. McMahon, Police Court of the District of Columbia. This arrest was made in the corridor outside of the Dies Committee Room in the Old House Building, Washington, D. C., between 3:30 P. M. and 3:40 P. M. on the aforesaid 10th day of February, 1940. Affiant was present in the Dies Committee

Room at the time Mr. Pelley was excused by the Committee and when the Committee adjourned. Mr. Pelley's arrest was subsequent to the adjournment of the Committee.

GUY RONE

Subscribed and sworn to before me this 13th day of May, 1940.

CHARLES E. STEWART,
Clerk

(Seal)

By WILLIAM A. WALTZ
Asst. Clerk.

264 *Order Dismissing Petition, Discharging Writ And Remanding Petitioner*

Filed April 5-1940

* * *

This cause having come on for hearing on the petition and answer filed herein and evidence having been adduced in open Court, it is, this 5th day of April, 1940,

ORDERED, that the petition be and the same is hereby dismissed, that the writ be and the same is hereby discharged, and that the petitioner be remanded to the custody of the respondent herein.

JESSE C ADKINS
Justice

Recognizance on appeal is hereby fixed in the sum of Five Thousand Dollars.

JESSE C ADKINS
Justice

No objection as to form
EDWARD M CURRAN

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265 *Motion for a Rehearing*

Filed April 10 1940

* * *

Comes now the petitioner in the above-captioned cause, by his attorney, T. Edward O'Connell, and moves this Honorable Court for a rehearing.

T. EDWARD O'CONNELL
Attorney for Petitioner

Order Denying Motion for Rehearing

Filed April 19 1940

* * *

This cause came up to be heard upon the motion of the petitioner for a rehearing and upon consideration thereof, it is by the Court this 19th day of April, 1940,

ORDERED that the said motion be, and the same is, hereby denied.

JESSE C. ADKINS,
Justice.

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266 *Petitioner's Suggested Findings of Fact and Conclusions of Law*

Filed April 22 1940

* * *

1. The Petitioner, William D. Pelley, and one Summerville, were convicted on January 22nd, 1935, in the Superior Court of Buncombe County, North Carolina, on two counts of a sixteen count indictment, thirteen of the sixteen counts having been dismissed by the Court, before the case went to the Jury.

2. On February 18, 1935, Judge Warlick, of the Superior Court of Buncombe County, North Carolina, sentenced the petitioner, William D. Pelley, as follows:—

"The judgment of the court is as to both defendants, the judgment being individual, that the defendant Pelley be confined in State's Prison at Raleigh, at hard labor, for a period of not less than one, nor more than two years."

"The foregoing sentence of imprisonment is suspended for a period of five years, on the following conditions:

"1. That the defendant Pelley pay a fine of One Thousand ($1,000) dollars and the costs of the case, which bill of cost has been approved by the court as made up by the clerk, and which, under the authority of the court is to include the total amount ordinarily for which the bill is made up by the Clerk, together with the exact amount which Buncombe County has heretofore paid out for the expenses of the jury during the thirteen days and the expenses

of the official court stenographer, it being the intent of the court to reimburse fully the county for each amount expended by it."

"2. That the defendant be and remain continuously of good behavior."

"3. That he not publish and (or) distribute in the State of North Carolina any periodical, which has to do with, or contains in it, any statement relating to a stock sale transaction or any report of any corporation as to its financial value or with the purpose of effecting a sale of stock in said corporation, without complying with the Capital Sales Issue Statute."

"On count No. 2 against the defendants Pelley and Summerville prayer for judgment continued for five (5) years."

267 3. On October 19, 1939, Judge Nettles, who at the time of petitioner's trial was his prosecutor, issued a capias

"for the arrest of the said W. D. Pelley, to be brought before the court for the purpose of imposing sentence upon the said W. D. Pelley within the said period of five years, and also for the purpose of determining whether his suspended sentence should be put into effect;"

4. The petitioner had a hearing before Chief Justice Wheat, of the District Court of the United States for the District of Columbia, who ordered the extradition of petitioner.

5. A Writ of Habeas Corpus was issued by Justice F. Dickinson Letts, of this Court, and the matter came on for hearing before Mr. Justice Jesse D. Atkins.

6. At the conclusion of the Habeas Corpus hearing, this court finds that the petitioner is substantially charged with crime in the State of North Carolina, and is a fugitive from justice of the State of North Carolina, petitioner having admitted on the witness stand, that during the month of October, 1939, while in Cincinnati, Ohio, petitioner read a newspaper clipping concerning the issuance of a capias for petitioner, in Buncombe County, North Carolina. The petitioner is the same person named in the Requisition Pa-

pers, signed by the Governor of the State of North Carolina, which fact was stipulated by counsel.

7. The Court finds as a fact that petitioner paid a fine on the first count, of One Thousand ($1,000) dollars, and the costs of the entire case totaling Seventeen Hundred and Nineteen Dollars and Fifty cents ($1719.50).

8. The Court finds the fact to be that petitioner has not been charged with any violation of law, since the said date February 18, 1935.

9. The Court finds as a fact, that the Requisition Papers from the State of North Carolina, do not charge petitioner with any violation of the laws of the State of North
268 Carolina, since the said date February 18, 1935.

10. The Court finds as a fact, that petitioner was not required by the terms of the suspended judgment, to remain within the State of North Carolina, nor was he required to report, or give an account of his activities to any agency of the State of North Carolina.

11. The Court finds the fact to be that the judge who presided at the trial of the petitioner, is still on the bench of the Superior Court of Buncombe County, North Carolina, and that the said judge has not issued any capias for the arrest of petitioner, but that the said capias was issued by the judge of that circuit, who prosecuted petitioner in 1935.

12. The Court finds as a fact, that no charge of any violation of the law of the United States, or of any State, has been made against petitioner since the date of the suspended judgment, to-wit, February 18, 1935.

13. The Court finds the fact to be that petitioner was arrested in a committee room of the House of Representatives, while still on the witness stand, where petitioner was in response to a subpoena issued by the said committee, the petitioner having finished testifying and having been notified that he was excused from further attendance under the subpoena.

14. The Court finds as a fact, that petitioner is not charged with any specific act, constituting a violation of any condition of parole, probation, or suspended sentence.

15. The Court finds as a fact, that a capias was issued for petitioner, but that no capias was issued for his co-defendant, against whom judgment was continued under the same terms as petitioner.

16. The Court finds as a fact, that the judge of Buncombe County who issued the capias for petitioner,
269 also signed an order directing the sheriff of Buncombe County, to search the premises of petitioner for anything which might incriminate petitioner, that the said order was executed, but that no return was made by the sheriff, and that the said order is not in the files of this case in Buncombe County, nor was it contained in the Requisition Papers, and that the statement of the judge who issued the capias, which statement was made at the time the capias was issued, and which statement contained the judge's reasons for issuing the capias, is also missing from the Requistion Papers, and is not part of the record in the Buncombe County Courthouse.

17. The Court finds as a fact, that petitioner's return to the State of North Carolina is sought for the purpose of imposing sentence upon petitioner.

18. The Court finds the fact to be that the judge of Buncombe County who issued the capias for petitioner, has stated under oath that he knows nothing of petitioner's activities, and that the said judge refuses to reveal the source of information upon which the issuance of the capias was based.

19. The Court found as a fact, that no affidavit was submitted to the judge who issued the capias, alleging any law violation, or any act on the part of petitioner, which constituted a breach of condition of suspended judgment.

20. The Court found as a matter of fact, that no affidavit was contained in the Requisition Papers of the Governor of North Carolina, alleging any law violation since February 18th, 1935, nor was there any affidavit of any act of the defendant, constituting a breach of condition of suspended judgment.

21. The Court finds as a fact, that the capias for petitioner was issued without an affidavit of any kind
270 to support it.

22. The Court finds as a matter of fact, that the sole basis upon which extradition is sought, is the issuance of the capias by the judge of the Superior Court of Buncombe County, North Carolina, authenticated by the Governor of North Carolina.

23. The Court finds as a fact, that the order extending the period of suspension, or continuance of judgment, was signed two days after the first five year period had expired.

Conclusions of Law

1. The Court held as a matter of law that the best evidence as to the correctness, completeness and authenticity of the requisition papers, and the best way to decide whether or not the petitioner was substantially charged with crime and was a fugitive, was the papers themselves, and not the Governor, who was available as a witness to testify under oath, subject to cross-examination as to all the material elements required of the requisition papers.

2. The Court ruled as a matter of law, that only those things which had been considered on the extradition hearing, could be considered on a Habeas Corpus to review the extradition.

3. The Court ruled, that evidence which would show that the issuance of the capias had been obtained by a person to gratify his own personal malice, and not for a violation of law, was inadmissible.

4. The Court ruled as a matter of law, that evidence to prove that the capias was issued as a result of animosity and prejudice, rather than upon the bad behavior of the petitioner, was inadmissible.

5. The Court ruled as a matter of law, that no evi-
271 dence could be offered on the part of the petitioner, that he was not a fugitive, or not charged with crime, when in the Court's opinion, the extradition papers were in proper order.

6. The Court ruled as a matter of law, that the question of whether or not the petitioner had violated the terms of a suspended sentence, could not be inquired into on Habeas Corpus.

7. The Court ruled as a matter of law, that despite newspaper quotations from Congressman Dies, some weeks before the capias was issued, that he, Dies, was going to have the capias issued, that nevertheless, no inquiry could be made and no evidence offered to prove that the capias was issued at the instigation of Dies, to gratify the personal animosity of Dies, and not because of any breach of the conditions of a suspended sentence by the petitioner.

8. The Court ruled as a matter of law, that even though the Judge who had suspended judgment against the petitioner, had taken no action to lift the suspension and impose sentence upon the petitioner, and that the said Judge is still on the same bench in North Carolina, and that the capias was issued by the man who prosecuted petitioner, and who had since ascended to the bench, but that this matter could not be inquired into as a matter of law, as it was no concern of the Court conducting the Habeas Corpus hearing.

9. The Court ruled as a matter of law, that even if petitioner was not charged with the breach of any condition of his suspended sentene, he was a fugitive when the capias was issued for him.

10. The Court ruled as a matter of law, that the cause of the issuance of a capias for petitioner, was no concern of the Court at the Habeas Corpus proceeding.

11. The Judge ruled as a matter of law, that the
272 cause of the personal animosity of the prosecutor, who afterward became Judge and issued the capias for petitioner, was no concern of the Court on a Habeas Corpus hearing.

12. The Judge ruled as a matter of law, that the Judge who issued the capias, need not know of any violation of law on the part of the petitioner before issuing a capias to revoke a heretofore suspended judgment.

13. The Court ruled as a matter of law, that the question of whether or not petitioner had violated N. C. law, was of no consequence whatsoever in the Habeas Corpus proceeding.

14. The Court ruled as a matter of law, that the Judge who issued the capias, need give no reason for the issuance of the capias and need not explain why the issuance of the capias was delayed for four years and eight months.

15. The Court ruled as a matter of law, that despite the statement, under oath, of the Judge who issued the capias for petitioner, that he knew nothing of the activities of petitioner, that the Judge was nevertheless justified in issuing a capias for petitioner.

16. The Court ruled as a matter of law, that the Judge issuing the capias, need not reveal what information the issuance of capias was based upon, nor what information he had of any misbehavior on the part of petitioner.

17. The Judge ruled as a matter of law, that the N. C. Judge acted in a perfectly legal manner in issuing capias for petitioner, despite the statement of the N. C. Judge, under oath that nobody "had requested that the capias issue".

18. The Court ruled as a matter of law, that a capias may issue at the whim or caprice of any Judge of any Judicial District, for any person, who has received a suspended sentence, or against whom prayer for judgment has
273 been continued, without disclosing any reason for the issuance of the capias.

19. The Court ruled as a matter of law, that the N. C. Judge had acted in a legal manner in issuing a capias, depite the fact that the prosecutor in that District had stated publicly, that there was no ground upon which any sentence could be imposed upon petitioner, the said prosecutor stating that petitioner, to his personal knowledge, had violated no law since sentence was suspended and prayer for judgment continued.

20. The Court ruled that the date of extending the period of petitioner's sentence for five years, was of no consequence whatsoever, despite Section 4665 of the North Carolina Code, expressly limiting such period of suspension to five years, and despite the fact that the record, authenticated by the Governor of North Carolina, did not show the date upon which the five year period of suspension was attempted to be enlarged to another five years.

21. The Court ruled as a matter of law, that the judge issuing the capias and giving his reasons for so doing may, by refusing to sign the minutes incorporating his remarks and reasons, keep his remarks and reasons out of the record.

22. The Court ruled as a matter of law, that the disappearance of an order from the record in the case, directing the sheriff "to seize any material of any nature whatsoever that might incriminate petitioner anywhere" was of no legal consequence whatsoever.

23. The Court ruled as a matter of law, that the search and seizure of petitioner's private correspondence and files, in an effort to secure information against petitioner, without issuance of a search warrant and without the justification of a sworn affidavit, was no concern of the Court on Habeas Corpus.

24. The Court ruled as a matter of law, that the
274 Requisition Papers were in perfect order, despite the fact that the judge who issued the capias, admitted signing an order directing the sheriff to seize the property and correspondence of petitioner, without a search warrant and without an affidavit upon which to base the said order, which said order appears nowhere in the record, nor in the Requisition Papers.

25. The Court ruled as a matter of law, that an illegal search and seizure of petitioner's private correspondence and files, seized in an effort to justify the issuance of a capias, in violation of petitioner's Constitutional rights, was no concern of the Court on a Habeas Corpus hearing.

26. The Court ruled as a matter of law, that the North Carolina judge may select anyone of several defendants and impose sentence on that one defendant, without giving any reason for so doing, despite the fact that that defendant is charged with no violation of law, any more than the defendants for whom no capias was issued.

27. The Court ruled as a matter of law, that the provision as to the first count, upon which petitioner was sentenced and the sentence suspended, the said suspension being conditioned on petitioner's good behavior, did not apply to the second count, upon which prayer for judgment was continued.

28. The Court ruled as a matter of law, that only the judge in the demanding State, may decide the question of whether or not the court of the demanding State has jurisdiction to demand the return of petitioner.

29. The Court ruled as a matter of law, that the sentence on both counts was not concurrent, and the conditions applicable to the suspension of sentence on the first count, did not apply to the second count.

30. The Court concludes as a matter of law, that a
275 Habeas Corpus hearing, reviewing an order for extradition, must confine itself to three things, one, identity, two, fugitivity, and three, charge of substantial law violation.

31. The Court concludes as a matter of law, that if the identity of petitioner on Habeas Corpus is admitted, the Court must confine itself to the question of whether or not the Requisition Papers are in proper order.

32. The Court concludes as a matter of law, that when a prayer for judgment is continued for a definite period, petitioner may be sentenced at any time during that period, without any violation, or charge of a breach of condition attached to continuance of prayer for judgment.

33. The Court holds as a matter of law, that one who reads in the newspapers of the issuance of a capias for him in another State, and does not return to that State, is a fugitive from justice.

34. The Court holds as a matter of law, that the question of whether or not the North Carolina Court had jurisdiction to issue a capias for petitioner, is irrelevant and immaterial in a Habeas Corpus proceeding.

35. The Court holds as a matter of law, that the continuance of a prayer for judgment, is not synonymous with an exercise of clemency based on petitioner's promise to observe the law.

36. The Court holds as a matter of law, that although petitioner paid a fine of One Thousand ($1,000) dollars, plus costs amounting to Seven Hundred and Sixteen ($716.00) dollars, that to sentence petitioner at this time, would not constitute double jeopardy.

37. The Court holds as a matter of law, that the issuance of a capias for a person not in the State, constitutes that person a fugitive.

276 38. The Court holds as a matter of law, that a capias may issue for one under a continued prayer for judgment, or suspended sentence, without any affidavit or allegation of misbehavior amounting to a violation of law.

39. The Court holds as a matter of law, that a capias may be issued by any judge, at the judge's own discretion.

40. The Court holds as a matter of law, that a capias may issue for one under a suspended sentence, without any breach of the conditions attaching to the suspension of sentence.

41. The Court holds as a matter of law, that there is no duty on the Governor to examine and study the papers, provided a request that the papers issue be made in the usual routine, and that the Governor's Seal upon the papers excludes any testimony tending to show that the papers are not in good order.

42. The Court holds as a matter of law, that even though the Governor is available as a witness, his testimony as to the papers, is irrelevant.

43. The Court holds as a matter of law, that although it is recognized that when an accused is convicted under an indictment or information containing two counts, that the sentence imposed upon each count must run concurrently unless otherwise specified in said sentence, and that although it was not so specified and directed in the case of petitioner, and although there was no showing that petitioner had breached any of the conditions of the sentence, he was nevertheless under a charge of crime and subject to extradition.

44. The Court holds as a matter of law, that although the demanding state is seeking in this case to sentence petitioner at separate times under the same indictment that petitioner is still subject to extradition.

45. The Court holds as a matter of law, that it is not necessary to offer evidence charging petitioner with crime to justify extradition.

277 46. The Court holds as a matter of law, that it is permissible and proper for the judge of the court of a demanding state to refuse to reveal his reasons for the issuance of a capias, although the record shows that said capias is for the purpose of imposing sentence upon a conviction had five years prior thereto.

47. The Court holds as a matter of law, that although there was an order announced by the judge at the time of the issuance of the capias, that a search for such order by petitioner to use in his Habeas Corpus proceeding failed to locate said order, it being missing from the files, that the extradition papers were nevertheless in proper form.

48. The Court holds as a matter of law, that though the Governor who signed the extradition papers stated he knew nothing regarding the case, he did not consider the Governor's testimony as material in the Habeas Corpus proceedings.

49. The Court holds as a matter of law, that though all the papers contain no breach of the conditions upon which the petitioner was sentenced, he was nevertheless under charge of crime.

50. The Court holds as a matter of law, that although the period of time under which the petitioner was to remain

of good behavior and keep the conditions of the sentence had expired, that the petitioner was still under charge of crime.

51. The Court holds as a matter of law, that no evidence regarding the motive actuating the extradition of defendant, was admissible, although the record showed no evidence of any breach of conditions in the sentence from the time of its issuance to its expiration.

52. The Court holds as a matter of law, that the act of a judge in another jurisdiction issuing a capias with no reason apparent on the record, is sufficient to warrant
278 extradition.

53. The Court holds as a matter of law, that although the petitioner is to be sentenced without a hearing, the petitioner is nevertheless subject to extradition.

54. The Court holds as a matter of law, that although the parties seeking the extradition of the petitioner admit that the five year term of the sentence had expired and the continuation of the term to another five years was of no effect, that the petitioner is nevertheless under charge of crime.

55. The Court holds as a matter of law, that if extradition papers appeared regular on their face, the petitioner had no right to offer evidence that he was not charged with crime, or that authorities were motivated by personal animosity or prejudice.

56. The Court holds as a matter of law, that the petitioner could not call witnesses properly subpoenaed, until the context of their testimony was first stated to him and he had passed upon its materiality.

57. The Court holds as a matter of law, that the extradition papers were in proper form, and that the petitioner could not introduce evidence that they were not.

58. The Court holds as a matter of law, that the petitioner was a fugitive from justice although the petitioner offered to produce testimony and precedents (North Carolina precedents) that he was not a fugitive, when no evidence either upon the face of the record or otherwise was offered to the contrary.

59. The Court holds as a matter of law, that though there was no evidence that the petitioner had violated the terms of his sentence, and that four years and eight months of the five years had run, before a capias was issued, and that the remainder of the five years had expired before the hear-

ing of the Habeas Corpus and that the continuation of the sentence was admittedly of no effect, that the petitioner was nevertheless a fugitive charged with crime.

60. The Court holds as a matter of law, that no affidavit charging the petitioner with any subsequent crime was necessary as part of the record in order to extradite the petitioner as a fugitive from justice.

61. The Court holds as a matter of law, that if the petitioner had once been convicted of crime and sentenced thereunder, and afterwards another judge of the circuit issued a capias arbitrarily charging that he was a fugitive from justice, that it would warrant extradition, notwithstanding that no subsequent offense was charged.

62. The Court holds as a matter of law, that although it is a fundamental principle of law that when a prisoner is convicted under two counts that the sentences thereon must run concurrently unless otherwise specified in the said sentence, and that such was not so specified in the sentence of the said petitioner, and that there was no evidence that he had violated any condition, he is nevertheless under charge of crime.

63. The Court holds as a matter of law, that the petitioner in this case should be extradited, notwithstanding that it is a fundamental principle of law that a prisoner cannot be sentenced at separate times under the same indictment and that the parties seeking extradition in these proceedings admit they seek so to do.

64. The Court holds as a matter of law, that no evidence charging crime is necessary in order to extradite a person, other than the fact that he was once convicted and sentenced for a crime in the State seeking his extradition, and that a judge thereof afterwards issued a capias for his arrest without any apparent reason for so doing.

65. The Court holds as a matter of law, that the judge of a court of the demanding state can issue a capias for one's arrest when the said arrest is sought by no one other than himself.

66. The Court holds as a matter of law, that it is permissible for the judge of the court of a demanding state to remain silent as to his reasons for issuing a capias, when the record specifically states that the said capias is for the purpose of sentencing a prisoner upon a conviction more than

five years old and long since taken from the docket of the court.

67. The Court holds as a matter of law, that although the petitioner was not in hiding, as attested by the fact that the petitioner voluntarily came to the Washington, D. C. jurisdiction to receive service of a subpoena of a congressional committee, and was arrested in the Capitol of the United States, he is nevertheless a fugitive.

68. The Court holds as a matter of law, that it is legal to arrest a witness appearing under a subpoena before a congressional committee in the Capitol of the United States, and that he is not subject to release on Habeas Corpus.

69. The Court holds as a matter of law, that although an order issued by the judge who issued the capias, searching for evidence to use in the proceedings, was missing from the record of the proceedings upon which petitioner's extradition was sought, that the extradition papers, nevertheless, were in proper form.

70. The Court holds as a matter of law, that if a defendant has undergone part of his punishment, a sentence can be revoked and one of greater severity substituted for it.

71. The Court holds as a matter of law, that statutes passed by the demanding state two years after the petitioner's sentencing, enlarging the severity of the sentence, were not ex post facto in the petitioner's case and
281 that they could apply in the matter of the petitioner's sentence . .

72. The Court holds as a matter of law, that when a prisoner is in custody pursuant to a final judgment of a state court of criminal jurisdiction, he is not entitled to any judicial inquiry in a court of the United States into the cause of his detention, when he has been sentenced on two counts of an indictment and both sentences suspended at the time of utterance.

73. The Court holds as a matter of law, that the rule laid down by the U. S. Supreme Court in Johnson vs. Zerbst, does not apply to the petitioner's case.

74. The Court holds as a matter of law, that although a state judge had issued an order to search the petitioner's premises and seize his properties and records to substantiate a capias after it was issued, that he was under no obligation to consider such an order, or any copy of it, regardless of the fact that the second judge's sheriffs acted under

it, when it had been refused to be certified by the clerk of the court in the demanding jurisdiction and the original was not in the files.

75. The Court holds as a matter of law, that public statements of the judge of the demanding court extending to over two columns in the newspapers, and admitting bias and animosity on the part of the demanding judge by their contexts, were immaterial and irrelevant to this hearing, and were not required as part of the record, inasmuch as the demanding judge had refused to certify them.

76. The Court holds as a matter of law, that what the law of the demanding state (North Carolina) providing for the petitioner's rights and protection in his present dilemma "was not relevant" and that he was under no obligation to consider it.

77. The Court holds as a matter of law, that al-
282 though the petitioner had paid a $1,000 fine and costs of the case at the time of sentencing and suspension of sentence, it thereby secured his waiver of all future rights of appeal in any subsequent action pertaining to further punishment growing out of his convictions, and that any attempts on petitioner's part to make the sentencing and demanding state keep faith with him in the item of probation and the terms thereof, was "an extraneous matter".

78. The Court holds as a matter of law, that because no record was entered of the petitioner paying a $1,000 fine and costs of the case, in the demanding papers reaching him from the Governor of the demanding state, that he was not bound to consider that such fine and costs had ever been paid regardless of the fact that the petitioner was released by the sentencing court and has pursued his normal activities for four years and eight months.

79. The Court holds as a matter of law, that any attempts to show that the petitioner had been consistently of good behavior as defined by law, during the term of his probation, were "irrelevant" on Habeas Corpus.

80. The Court holds as a matter of law, that any testimony of the demanding state's special prosecutor, tending to show that the petitioner had been consistently of good behavior during his probation as defined by law, was irrelevant.

81. The Court holds as a matter of law, that if the extradition papers consisted of his original indictment, his con-

viction, judgment and sentence showing the case was continued for five years, and before the expiration of the five years the Court said it wanted him back, he thereby became a fugitive regardless of the fact that he had kept faith throughout the five years with the terms of the probation and the sentence of the demanding state.

82. The Court holds as a matter of law, that in considering the depositions taken by petitioner's counsel in the demanding state, he was not bound to consider any such testimony as evidence that went outside the alleged authenticity of the record and showed the demanding papers to be incomplete or incorrect.

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83. The Court holds as a matter of law, that during the five years of the petitioner's probation, the petitioner could not travel or live where he wanted throughout the 48 states, regardless of the fact that the sentencing judge of the demanding state did not specify to the contrary in his sentence and suspension.

84. The Court holds as a matter of law, that because the petitioner was convicted and sentenced over five years in the past, he has not finished serving his sentence in that "he has not suffered the penalty imposed by law" because his sentences were suspended and a judge other than the sentencing judge wants him back to terminate the said suspensions and imprison him.

85. The Court holds as a matter of law, that only the judge of the court charging the crime and securing the indictment and convictions is capable of passing on whether or not the petitioner is culpable under suspension of further punishment.

86. The Court holds as a matter of law, that a court of the demanding state has the power to revoke suspension of a sentence regardless of the fact that the time of its jurisdiction has expired by the stipulations of its own state statutes . . thereby making it possible for the petitioner to be kept under suspended sentence for a lifetime if a capias be issued within five years of each additional suspension of sentence.

87. The Court holds as a matter of law, that the petitioner has the status of a fugitive from justice regardless of the fact that he has been living within the jurisdiction of the sentencing court and conducting his manufacturing-printing business therein for the past five years and

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was traveling about his lawful sales business in another state by coincidence when the capias was issued that he be brought in for sentence on the original charge.

88. The Court holds as a matter of law, that where the return of any person is sought from one state to another, and that person is charged with having violated either the terms of a suspended sentence, or probation, and Habeas Corpus hearing is held to review the order for extradition, the hands of the Court are tied, the scope of the inquiry is limited, and no inquiry may be made as to whether or not the demanding state was justified in issuing the order for the return of that person.

89. The Court holds as a matter of law, that no inquiry may be made in the courts of the asylum state as to the justification or injustice of the demand for the return of petitioner, where a prayer for judgment has been continued.

90. The Court holds as a matter of law, that whether or not a capias was issued for the return of petitioner at the whim or caprice of a judge in the demanding state, is no concern of the Court on Habeas Corpus in the asylum state.

91. The Court holds as a matter of law, that even though the Court in the asylum state on the Habeas Corpus hearing is satisfied that there is no subsequent charge of law violation against a probationer, the presumption that such matter will be noticed by the Courts in the demanding state, precludes the Court in the asylum state from going into the matter of whether or not petitioner has been of good behavior.

92. The Court holds as a matter of law, that a judge in any county court in the United States may procure the return of a probationer or one whose sentence has been suspended, within the period of suspension, and that
285 person may not raise the question as to whether his return to the demanding state is justified by law, as that is a question solely for the Courts of the demanding state.

93. The Court holds as a matter of law, that a probationer, or one under a suspended sentence, against whom a capias has been issued in another state, has no recourse but to return to that state regardless of the fact that he has done nothing to violate either the law, or the terms of his probation, or suspended sentence.

94. The Court holds as a matter of law, that though petitioner was arrested in a committee room of the House of Representatives, where he was in response to a subpoena, that the arrest, as a matter of law, was perfectly legal.

95. The Court holds as a matter of law, that though petitioner is not charged with any violation of the law of North Carolina, nor with any breach of condition attached to his suspended sentence, as a matter of law, he was a fugitive and must present the aforesaid matters to the North Carolina Court.

96. The Court holds as a matter of law, that prayer for judgment having been continued for five years from the 17th of February, 1935, that this fact gave any judge of the 19th Judicial Circuit of North Carolina, the right to issue a capias for the petitioner, without any showing of a violation of law or breach of condition, attached to the suspension of judgment.

97. The Court holds as a matter of law, that prayer for judgment having been continued for five years from the 17th of February, 1935, that the issuance of a capias, at any time within the said period of five years, without any allegation of a violation of law, or breach of condition attached to suspension of judgment, made petitioner a fugitive.

98. The Court holds as a matter of law, that the
286 requisition papers showed on their face, that petitioner was wanted, not for the purpose of conducting a hearing as to any breach of condition attached to a suspended sentence, but for the express purpose of imposing sentence upon petitioner, but that nevertheless, as a matter of law, the papers were in good order.

99. The Court holds as a matter of law, that if the Court found as a matter of fact that petitioner had paid a one Thousand ($1,000) dollar fine on the first count, and Seven Hundred odd dollars costs on all counts, that the North Carolina Court could issue a capias for petitioner without stating any reason for so doing, and that the issuance of that capias constituted petitioner a fugitive, if found in another state.

100. The Court holds as a matter of law, that petitioner was under a suspension of imposition of sentence for five years, dating from February 17, 1935, and that this suspension of imposition of sentence gave any judge of Bun-

was traveling about his lawful sales business in another state by coincidence when the capias was issued that he be brought in for sentence on the original charge.

88. The Court holds as a matter of law, that where the return of any person is sought from one state to another, and that person is charged with having violated either the terms of a suspended sentence, or probation, and Habeas Corpus hearing is held to review the order for extradition, the hands of the Court are tied, the scope of the inquiry is limited, and no inquiry may be made as to whether or not the demanding state was justified in issuing the order for the return of that person.

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91. The Court holds as a matter of law, that even though the Court in the asylum state on the Habeas Corpus hearing is satisfied that there is no subsequent charge of law violation against a probationer, the presumption that such matter will be noticed by the Courts in the demanding state, precludes the Court in the asylum state from going into the matter of whether or not petitioner has been of good behavior.

92. The Court holds as a matter of law, that a judge in any county court in the United States may procure the return of a probationer or one whose sentence has been suspended, within the period of suspension, and that
285 person may not raise the question as to whether his return to the demanding state is justified by law, as that is a question solely for the Courts of the demanding state.

93. The Court holds as a matter of law, that a probationer, or one under a suspended sentence, against whom a capias has been issued in another state, has no recourse but to return to that state regardless of the fact that he has done nothing to violate either the law, or the terms of his probation, or suspended sentence.

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95. The Court holds as a matter of law, that though petitioner is not charged with any violation of the law of North Carolina, nor with any breach of condition attached to his suspended sentence, as a matter of law, he was a fugitive and must present the aforesaid matters to the North Carolina Court.

96. The Court holds as a matter of law, that prayer for judgment having been continued for five years from the 17th of February, 1935, that this fact gave any judge of the 19th Judicial Circuit of North Carolina, the right to issue a capias for the petitioner, without any showing of a violation of law or breach of condition, attached to the suspension of judgment.

97. The Court holds as a matter of law, that prayer for judgment having been continued for five years from the 17th of February, 1935, that the issuance of a capias, at any time within the said period of five years, without any allegation of a violation of law, or breach of condition attached to suspension of judgment, made petitioner a fugitive.

98. The Court holds as a matter of law, that the
286 requisition papers showed on their face, that petitioner was wanted, not for the purpose of conducting a hearing as to any breach of condition attached to a suspended sentence, but for the express purpose of imposing sentence upon petitioner, but that nevertheless, as a matter of law, the papers were in good order.

99. The Court holds as a matter of law, that if the Court found as a matter of fact that petitioner had paid a one Thousand ($1,000) dollar fine on the first count, and Seven Hundred odd dollars costs on all counts, that the North Carolina Court could issue a capias for petitioner without stating any reason for so doing, and that the issuance of that capias constituted petitioner a fugitive, if found in another state.

100. The Court holds as a matter of law, that petitioner was under a suspension of imposition of sentence for five years, dating from February 17, 1935, and that this suspension of imposition of sentence gave any judge of Bun-

combe County Superior Court the arbitrary right to issue a capias for petitioner, at any time within the said period of five years, without any set rules of procedure to guide the Court and without any restrictions whatsoever on the power of the Court to issue a capias and bring back petitioner from any place in the world where he might be found.

101. The Court holds as a matter of law, that petitioner was not ordered to stay within the confines of the State of North Carolina, was not ordered to report to any agency of the State of North Carolina, and was not requested to give an account of himself, or his activities, to any agency of North Carolina, but that petitioner automatically became a fugitive as a matter of law, when a capias was issued for him without any specific charge of misbehavior, or allegation of any specific act breaching conditions of the theretofore suspended sentence.

102. The Court holds as a matter of law, that the
287 question of whether or not petitioner had violated the terms of his suspended sentence, was no concern of the Court on Habeas Corpus hearing.

103. The Court holds as a matter of law, that the extradition papers issued by the Governor when he admitted he had no knowledge regarding the matter were the best evidence to prove the fugitivity of the petitioner and if said papers appeared regular upon their face, no evidence of any other kind to prove that he was not a fugitive or that the papers were not in order was admissible.

104. The Court holds as a matter of law, that if the governor's extradition papers appeared in proper form although the Governor admitted he just signed the papers, and knew nothing whatever regarding the matter, were the best evidence and that no evidence to prove that they may have been obtained upon false suggestion or personal animosity was admissible.

105. The Court holds as a matter of law, that petitioner had no right to offer evidence from two judges of the asylum state, who refused to issue a warrant of arrest for petitioner as to their reasons for so refusing, although their refusal came after the District Attorney's office had refused to honor a request for a warrant of arrest, said refusal being based on the fact that the person sought was not charged with any violation of law subsequent to suspension of sentence.

106. The Court holds as a matter of law, that one whose extradition is sought has no right to know who pays the compensation of his prosecutors, even though it be admitted that his prosecutors are receiving private compensation.

107. The Court holds as a matter of law, that where on the taking of depositions it is sought to discover the source of compensation for the prosecutors, and the prose-
288 cutor whose deposition is being taken refuses to answer on the ground that he will appear in court and answer if ordered to do so, if one of the prosecutors thereafter fails to appear in court, no action will be taken to make him answer the questions propounded to him.

108. The Court holds as a matter of law, that one properly subpoenaed within the jurisdiction to appear in court as a witness, may send a letter to the judge, stating that he knows nothing about the case, fail to appear at the time of trial and no action may be taken by the party at whose instance he was subpoenaed.

109. The Court holds as a matter of law, that whether or not one shall be required to appear in court when properly subpoenaed within the jurisdiction, depends upon how important in the affairs of a state the recipient of the subpoena is.

110. The Court holds as a matter of law, that any person desiring to evade an appearance in court, may do so by sending a letter to the judge, advising him he knows nothing of the case.

111. The Court holds as a matter of law, that a party who subpoenas a witness has no remedy if that witness fails to appear in court, although properly subpoenaed, provided the witness sends a letter to the judge stating he knows nothing of the case.

112. The Court holds as a matter of law, that no litigant has the right to a subpoenaed witness' testimony, if that witness sends a letter to the judge, stating that he knows nothing about the case.

113. The Court holds as a matter of law, that one who is under a suspended sentence may be brought back from any part of the world and the question as to whether or not his return is justified, may only be decided in the court which demands his return.

289 114. The Court holds as a matter of law, that one under a suspended sentence, whose return is demanded from any part of the world, has no right to demand that the court in the place of his asylum inquire as to whether or not he is charged with any act which violates the terms or conditions of his suspended sentence.

115. The Court holds as a matter of law, that a judge of any county court of the United States may impose a fine, plus cost, and condition the suspension of sentence on one count on the payment of cost of an entire case, including stenographer's fee and continue the imposition of sentence for a period of five years and after the time within which an appeal might be taken, has expired, call the defendant in from any part of the world and impose a maximum sentence according to the disposition of the county judge.

116. The Court holds as a matter of law, that no inquiry may be made as to whether the prosecution designed to bring a person from any part of the world to any county court of said state, is being paid for by private persons, or is being sought for private purposes.

117. The Court holds as a matter of law, that one sought to be returned from any part of the world to a county court, has no right to inquire as to who is financing the cost of his prosecution.

118. The Court holds as a matter of law, that a private prosecutor paid by unknown persons, may appear in any Federal Court, of the United States, address the court and demand the return of another person and refuse to divulge the source or amount of his compensation.

119. The Court holds as a matter of law, that one whose return is sought from one state to another, has no
290 right to inquire as to the source or amount of private compensation paid to the private prosecutors, who appear in the courts of the asylum state and has no right to know what private persons are spending money in an effort to return him to the demanding state.

120. The Court holds as a matter of law, that any attorney who argues matters which the trial judge considers not germane to the issues on Habeas Corpus, may in the judge's discretion be cited for contempt.

121. The Court holds as a matter of law, that the petitioner on Habeas Corpus may not interrogate a witness, properly subpoenaed and in court, with regard to whether

or not that witness had procured the issuance of a capias in another state without any affidavit or justification in law, despite the fact that that witness has publicly stated prior to the issuance of the capias, that "he was going to get Judge Nettles to impose the sentence which he had suspended".

122. The Court holds as a matter of law, that petitioner has no right to offer evidence from the District Attorney, who refused to issue a warrant for purposes of arrest for extradition, said refusal being based on the fact that it was not shown that petitioner had violated any law subsequent to suspension of sentence, and that shortly thereafter, the District Attorney did authorize the issuance of the said warrant.

123. The Court holds as a matter of law, that any judge in any county court in the United States, may procure the return of a probationer, or one whose sentence has been suspended, within the period of suspension, and that person may not raise the question as to whether his return to the demanding state is justified by law, as that is a question solely for the courts of the demanding state.

124. The Court holds as a matter of law, that a
291 probationer under a suspended sentence, against whom a capias has been issued in another state, has no recourse but to return to that state, regardless of the fact that he has done nothing to violate either the law, or the terms of his probation or suspended sentence.

125. The Court holds as a matter of law, that the judge of any county court of the United States is the sole and final arbiter of the question as to whether or not he is justified in issuing a capias, for a person in another state, when that person is either on probation or under a suspended sentence.

126. The Court holds as a matter of law, that where a witness fails to appear in response to a properly served subpoena, the party seeking his testimony has no recourse, where the trial judge says that in his opinion, the testimony of the witness is not relevant or material.

127. The Court holds as a matter of law, that the governor of a state may refuse to appear in response to a properly served subpoena, if he is too busy.

128. The Court holds as a matter of law, that a United States subpoena for the appearance of a witness in a Fed-

eral Court, is not legally binding on any person, provided that the subpoenaed person sends word to the court that he knows nothing of the case.

Respectfully submitted,

T. EDWARD O'CONNELL
Attorney for petitioner

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292 *Findings of Fact*

Filed May 3 1940

* * *

1—Petitioner William D. Pelley was convicted at the January 1935 Term, to wit, January 22, 1935, of the Superior Court of Buncombe County, state of North Carolina on the first and second counts of a sixteen count indictment. Said indictment is set forth in the requisition papers and made part hereof by reference.

2—At the February 1935 Term, to wit, February 18, 1935, of said Superior Court of Buncombe County, North Carolina the court imposed a sentence on the first count of said indictment that the petitioner be confined in the State's Prison at Raleigh at hard labor for a period of not less than one nor more than two years. The foregoing sentence of imprisonment was suspended for a period of five years on certain conditions. On the second count of said indictment prayer for judgment was continued for five years. A copy of the sentence is set forth in the record and made part hereof by reference.

3—Petitioner paid the fine of $1,000 imposed as a condition of the suspension of said sentence and also the costs, payment of which was also required as a condition of said suspension.

4—At the October 1939 Term, to wit, October 19, 1939, of the Superior Court of Buncombe County, North Carolina a capias was issued for the arrest of the petitioner for the purpose of bringing the petitioner before the court. Copy of said capias is set forth in the requisition papers and is made part hereof by reference.

5—At the time of the issuance of the capias set forth in Finding 4 petitioner was absent from the state of North Carolina. He learned of the fact that said capias had

293 been issued within a day or two thereafter, and since that time has been absent from the state of North Carolina.

6—Petitioner had a hearing before the Chief Justice of the District Court of the United States for the District of Columbia, who found the petitioner to be substantially charged with crime in the state of North Carolina and to be a fugitive from justice of the state of North Carolina. The Chief Justice of the District Court of the United States for the District of Columbia after said hearing issued an order surrendering petitioner to the agent of the state of North Carolina, copy of which is made part hereof by reference.

7—The petitioner is a fugitive from justice from the state of North Carolina and has been a fugitive from justice from the state of North Carolina from or about the time of the issuance of the capias above mentioned.

8—The petitioner is the same person who is named in the requisition papers signed by the Governor of the state of North Carolina and in the said indictment.

9—Since the conviction mentioned in these Findings petitioner has not been charged in the court in which said conviction was had, nor in any other court, Federal or state, in the state of North Carolina, with the violation of any law of that state or of the United States.

10—The issuance of said capias was not based upon any affidavit filed in the cause in which said capias was issued, nor upon any affidavit submitted to the judge who issued said capias.

May 3, 1940

JESSE C ADKINS
Justice

294 *Conclusions of Law*

Filed May 3 1940

* * *

The Court concludes as matter of law—

1—That petitioner is the person described in the requisition papers, and is the same person who was convicted and sentenced as set forth in the Findings of Fact.

2—Petitioner is a fugitive from the justice of the state of North Carolina.

3—The requisition papers substantially charge the petitioner with the commission of crime in the state of North Carolina, and substantially state facts which require his return to that state as a fugitive from justice.

May 3, 1940

JESSE C ADKINS
Justice

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295 *Notice of Appeal*

Filed May 4 1940

* * *

Notice is hereby given this 4th day of May, 1940, that William D. Pelley, petitioner hereby appears to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of April, 1940 in favor of respondent against said William D. Pelley.

T. EDWARD O'CONNELL
Attorney for William D. Pelley, petitioner

Memorandum

June 10 - 1940.

Time for filing transcript of record in United States Court of Appeals extended from day to day, to August 2, 1940.

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296 *Assignment of Errors*

Filed July 19 1940

* * *

1. The Court erred in dismissing the petition and discharging the writ.
2. The Court erred in failing to release petitioner on court's own Findings of Fact.
3. The Court erred in denying prayers of petitioner.
4. The Court erred in excluding testimony offered by petitioner.

5. The Court erred in refusing to admit in evidence defendant's Exhibits No. 1, 2, 3, 4, 5, 6 and 7.

6. The Court erred in denying the Motion for a Rehearing.

7. The Court erred in restricting the scope of the Habeas Corpus proceeding.

8. The Court erred in refusing to adopt petitioner's suggested Findings of Fact and Conclusions of Law.

9. The Court erred in holding that petitioner was a fugitive from justice, while at the same time, making a finding of fact that petitioner had never been charged in any court of any state, or of the United States, with any violation of law from the date of the suspension of imposition of sentence.

10. The Court erred in holding that petitioner was a fugitive, while at the same time making a finding of fact that no affidavit of any kind had been filed alleging a violation of law by petitioner.

297 11. The Court erred in holding that, even though petitioner was not charged with the breach of any condition of his suspended sentence, he was a fugitive when the capias was issued for him.

12. The Court erred in holding that petitioner was a fugitive from justice when a capias, not based upon an affidavit, was issued against petitioner, while the petitioner was absent from the State of North Carolina, when petitioner was not required to remain within the State of North Carolina.

13. The Court erred in concluding as a matter of law that petitioner was a fugitive from justice, while at the same time making a finding of fact, that petitioner had paid a fine of $1000, plus costs of $716.00, as a condition of suspension of sentence, and making a further finding of fact that no affidavit relating to a violation of the said conditions of suspension of sentence had been submitted to the judge who issued capias for petitioner, and that the aforementioned costs covered the entire case.

14. The Court erred in holding that petitioner's prosecutor, now a judge, might sentence petitioner to jail, without any showing of a violation of law, or breach of condition attached to suspension of judgment, while the judge, before whom the case was tried and who still sits on that bench, has never had occasion to cite petitioner for any violation of the terms of his suspension of sentence.

15. The Court erred in holding that a North Carolina Court may induce a defendant to waive his right of appeal by suspending sentence on one of two counts and suspending the imposition of sentence on the other count, and then revoke the suspension and impose the sentence, long after the time for taking an appeal has expired, at the whim or caprice of the judge. Record P. 2, Motion for Rehearing.

16. The Court erred in holding that a man under a
298 suspended sentence, or suspended imposition of sentence, becomes a fugitive without any allegation, by way of affidavit, of a violation of the conditions of said suspension, merely by the issuance of a capias.

17. The Court erred in holding that petitioner is a fugitive, although the judge who issued the capias for petitioner's arrest has stated under oath in this proceeding, that he knows no thing of petitioner's activities and although no affidavit has been filed, said judge refuses to reveal the source of information upon which the issuance of the capias was based. Record Nettles Deposition.

18. The Court erred in holding that the Buncombe County judge need not reveal what information the issuance of the capias was based upon, nor what information he had of any misbehavior on the part of petitioner, while stating under oath in this proceeding, that nobody "had requested that the capias issue."

19. The Court erred in holding that the judge of Buncombe County who issued the capias for petitioner's arrest, may refuse to give a reason for the issuance of the capias and need not explain why the issuance of the capias was delayed for 4 years and 8 months, when his deposition was taken in the proceeding.

20. The Court erred in holding that the Buncombe County judge could select one of several defendants under a suspended sentence and impose sentence on that one defendant, without giving any reason for so doing, there being no allegation of a violation of the conditions of suspended sentence against any of the defendants.

21. The Court erred in holding that a prosecutor, who afterwards becomes judge, may exchange courts with the judge in the county where the case previously prosecuted by him was tried and then arbitrarily issue a capias for the defendant whom he prosecuted, without any affidavit

being submitted alleging a violation of the conditions of defendant's suspended sentence.

299 22. The Court erred in holding that, altough the petitioner had paid a $1000 fine and costs of the case at the time of sentencing and suspension of sentence, it thereby secured his waiver of all future rights of appeal in any subsequent action pertaining to further punishment growing out of his convictions, and that any attempts on petitioner's part to make the sentencing and demanding state keep faith with him in the item of probation and the terms thereof, was irrelevant.

23. The Court erred in holding that a judge of any county court of the United States may impose a fine, plus costs, and condition the suspension of sentence on one count on the payment of costs of an entire case, including stenographer's fee and continue the imposition of sentence for a period of five years and after the time within which an appeal might be taken has expired, call the defendant in from any part of the world and impose a maximum sentence according to the disposition of the county judge.

24. The Court erred in holding that the sentence on both counts was not concurrent.

25. The Court erred in holding that the conditions applicable to suspension of sentence on the first count, did not apply to the second count, upon which imposition of sentence was suspended, despite the fact that defendant had paid all costs of the entire proceeding and there was no provision in the judgment of the court that the sentences were to be consecutive.

26. The Court erred in holding that, although petitioner paid a fine of $1000, plus costs amounting to $716.00, to sentence petitioner at this time would not constitute double jeopardy.

27. The Court erred in holding that, although it is recognized that when an accused is convicted under an indictment or information containing two counts, that the sen-

300 tence imposed on each count must run concurrently unless otherwise specified in said sentence, and that although it was not so specified and directed in the case of petitioner, and although there was no showing that petitioner had breached any of the conditions of the sentence, he was nevertheless under a charge of crime and subject to extradition.

28. The Court erred in holding that no inquiry may be made in the courts of the asylum state as to the justification or injustice of the demand for the return of petitioner, where a prayer for judgment has been continued. Record P. 2, Trans. of April 18, '40.

29. The Court erred in failing to find as a fact, that petitioner was not required to remain within the confines of the State of North Carolina, although this was conceded by both petitioner and respondent.

30. The Court erred in concluding as a matter of law that the requisition papers substantially charged the petitioner with the commission of crime in the State of North Carolina, while at the same time making a finding of fact, that petitioner had not been charged with any crime since the suspension of sentence, or the suspension of imposition of sentence.

31. The Court erred in holding that only the judge in the demanding state may decide the question of whether or not that court has jurisdiction to demand the return of petitioner.

32. The Court erred in holding that the petitioner in this case should be extradited, notwithstanding that it is a fundamental principle of law that a prisoner cannot be sentenced at separate times under the same indictment, and that the parties seeking extradition in these proceedings admit they seek so to do.

33. The Court erred in holding that a probationer, or one under a suspended sentence, against whom a capias has been issued in another state, has no recourse but to return to that state regardless of the fact that he has done nothing to violate either the law, or the terms of his probation, or suspended sentence.

301 34. The Court erred in holding that a judge may, at any time during the period of suspension of imposition of sentence, revoke said suspension, without giving any reason for so doing. Page 2, Rehearing Transcript, April 18, '40.

35. The Court erred in holding that it is not necessary to offer evidence of a charge of crime, or of the breaking of conditions of a suspended sentence to justify extradition. Not one word of testimony in the entire record charges petitioner with any law violation since the time of suspension of sentence, nor with any breach of condition attached

to such suspension. Record P. 89, Transcript of April 4, 1940

36. The Court erred in refusing to consider the law of the State of North Carolina, in deciding the questions of whether or not petitioner was a fugitive from that state and whether or not petitioner was substantially charged with crime so as to justify extradition. Record P. 90 Transcript of April 4, 1940

37. The Court erred in holding that the question of whether or not petitioner had violated the terms of a suspended sentence could not be inquired into on Habeas Corpus. P. 88-90 April-4-'40

38. The Court erred in holding that the offer by petitioner to show by the testimony of witnesses, that the judge had been prevailed upon to revoke a suspension of sentence, or imposition of sentence, to gratify personal malice of certain persons, was immaterial. Record P. 145-146 Trans. of April 5, 1940

39. The Court erred in holding that the petitioner on Habeas Corpus may not interrogate a witness, properly subpoenaed and in court, with regard to whether or not that witness had procured the issuance of a capias in another state without any affidavit or justification in law, despite the fact that that witness has publicly stated prior to the issuance of the capias, that "he was going to get Judge Nettles to impose the sentence which had been suspended by Judge Warlick." Record P-145, Trans. of April 5, 1940

302 40. The Court erred in refusing to permit petitioner to show that his extradition was sought to gratify the personal malice of certain persons, while the record in the instant case discloses that the two special prosecutors from North Carolina refuse to disclose the source of their private compensation in this extradition and Habeas Corpus proceeding.

41. The Court erred in refusing to force witnesses, whose depositions were taken, to answer questions propounded to them and which questions the witnesses arbitrarily refused to answer, and which questions were material to this inquiry.

42. The Court erred in holding that a private prosecutor paid by unknown persons, may appear in any Federal Court of the United States, address the court and demand the re-

turn of another person and refuse to divulge the source or amount of his compensation. Deposition of Mr. Williams and J. T. Harkins, and P. 41 Trans. of April 4, 40

43. The Court erred in holding that one whose extradition is sought has no right to know who pays the compensation of his prosecutors, even though it be admitted that his prosecutors are receiving private compensation. P 41 Trans. of April 4, '40 and Depositions of Williams and Harkins

44. The Court erred in holding that a United States subpoena for the appearance of a witness in a Federal Court, is not legally binding on any person, provided that the subpoenaed person sends word to the Court that he knows nothing of the case.

45. The Court erred in holding that, although there may be a question or dispute as to the essential facts justifying the issuance of requisition papers that the governor could not be summoned as a witness in a Habea Corpus proceeding to show lack of justification for extradition, although said governor had been personally served with a subpoena in the District of Columbia.

303 46. The Court erred in holding that, although petitioner's witnesses had been properly summoned, that the substance of the testimony of such witnesses must first be submitted to the court for approval before such witnesses could testify.

47. The Court erred in holding that, where a witness fails to appear in response to a properly served subpoena, the party seeking his testimony has no recourse where the trial judge says, that in his opinion, the testimony of the witness is not relevant or material.

48. The Court erred in holding that the governor who requested extradition and who was subpoenaed within this jurisdiction, may not be questioned, despite the governor's own statement that he knows nothing about the case.

49. The Court erred in holding that the governor's seal upon the extradition papers precludes petitioner from offering any testimony tending to show that the papers are not in good order.

50. The Court erred in refusing to find as a fact that the judge of the Buncombe County Court had exceeded his authority in extending the five year period of suspension of sentence, when such fact was conceded by respondent, and

despite section 4665 of the North Carolina Code, expressly limiting such period of suspension to five years. Record P. 161-2 Trans. of April 5, 1940 P. 130 Trans of April 4, 1940

51. The Court erred in holding that, although the period of time under which the petitioner was to remain of good behavior and keep the conditions of the suspension of sentence had expired, the petitioner was still under charge of crime. Respondent concedes that the Buncombe County judge had no right to extend the period of suspension of sentence. Record P. 161-2. Trans. of April 5, 1940

52. The Court erred in holding that petitioner could not go outside the record in a hearing on Habeas Corpus for the purpose of showing that extradition was not sought in good faith, despite the ruling in the case of Johnson vs. Zerbst 304 U. S. 458

304 53. The Court erred in holding that petitioner, on Habeas Corpus, must confine himself solely to the matters considered on extradition.

54. The Court erred in holding that petitioner had no right to offer evidence from two judges of the asylum state, who refused to issue a warrant of arrest for petitioner as to their reasons for so refusing, although their refusal came after the District Attorney's office had refused to honor a request for a warrant of arrest, said refusal being based on the fact that the person sought was not charged with any violation of law subsequent to suspension of sentence. Record P. 141 Trans. of April 5, '40

55. The Court erred in holding that petitioner could not go outside the record to show that his extradition was sought for private purposes, although the judge who issued the capias for petitioner's arrest, had formerly been his prosecutor and had exchanged courts with the judge of Buncombe County Court, just prior to the issuance of capias for defendant's arrest, by the former prosecutor, now judge. Record of Exchange Contained in Extradition Papers.

56. The Court erred in holding that the search and seizure of petitioner's private correspondence and files in an effort to secure information against petitioner, without issuance of a search warrant and without justification of a sworn affidavit, was no concern of the court on Habeas Corpus. The judge of Buncombe County admits in his deposi-

tion, signing such an order and also looking at the files. Record P. 19, 20, 21 Nettles Deposition

57. The Court erred in holding that any testimony of the demanding state's prosecutor, or any others, tending to show that the petitioner had been consistently of good behavior during his probation, as defined by law, was irrelevant. Def. Ex. #7.

305 58. The Court erred in holding that petitioner was a fugitive from justice, although petitioner had not concealed himself and came to the District of Columbia voluntarily to accept service of a subpoena of a congressional committee. P-80-83 Trans. of April 4, 1940.

59. The Court erred in holding that the arrest in the United States Capitol of a witness appearing there in response to a subpoena by a congressional committee, is not immune from such arrest and is not entitled to relief on Habeas Corpus. Record P. 83, April 4, 1940.

T. EDWARD O'CONNELL,
Attorney for petitioner.

306 *Substituted Designation of Record*

Filed June 28 1940

* * *

The clerk will please include the following in the record to be certified to the Court of Appeals:

1. Extradition papers from North Carolina as follows:
A. Application for requisition. Req. #781
B. Request of Governor Hoey for extradition.
C. Judgment No. 13.
D. Order authorizing Judge Nettles to Exchange Court with Judge J. A. Rousseau.
E. Order of October 19, 1939, appointing Williams and Harkins Special Prosecutors.
F. Capias.
G. Judge's order extxending period of suspension of sentence.
H. Verification.
2. Order of Judge Wheat.
3. Petition and Fiat for Writ of Habeas Corpus.
4. Writ of Habeas Corpus.
5. Answer to Petition.

6. Notice to take depositions.

7. Marshal's return on subpoenaes to Nettles, Wells, Jordan, Swain, Williams, Harkins and Ford. Marshal's return on Clyde Hoey, McMahon, Kindleberger, Martin Dies and Robert Barker.

8. Depositions of April 1-1940 and of Robert H. McNeil.

9. Exhibits B and E attached to Swain's deposition with verification of Clerk Swain.

10. Transcripts of the evidence and proceedings in the above entitled matter which volumes are described as follows:

307 Vol.—March 12, 1940 Requisition No. 781
Vol.—April 4, 1940 Habeas Corpus Proceedings
Vol.—April 5, 1940 Habeas Corpus Proceedings
Vol.—April 18, 1940 Motion for Rehearing
Affidavit of Detective Sergeant Guy Rhone

11. Defendant's exhibits:—

A. Letter of Governor Hoey.

B. Clipping Cincinnati Inquirer.

C. Order for search of Pelley's premises.

D. Newspaper clipping Asheville Citizen of September 12th.

E. Asheville Citizen October 21st.

F. Asheville Advertiser February 23, 1940.

G. Asheville Times October 19, 1940.

12. Petitioner's suggested findings of fact and conclusions of law.

13. Court's findings of fact and conclusions of law.

14. Order of Judge Adkins dismissing petition.

15. Motion for Rehearing and Order denying same.

16. Notice of Appeal.

17. Assignments of Error (to be filed later)

18. This Designation.

T. EDWARD O'CONNELL
Attorney for William D. Pelley

Copy of the foregoing acknowledged this 26th day of June, 1940

ALBERT GOLDSTEIN
Asst U S Atty

308 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 307, both inclusive (excepting Report of Proceedings, as to the accuracy of which, counsel has certified), to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause entitled In re William D. Pelley, Habeas Corpus No. 2067, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 31st day of July, 1940.

CHARLES E. STEWART,
Clerk.

By ANDREW A. HOMER,
Assistant Clerk.

(Seal)

309 H. C. 2067

Filed April 1-1940 Charles E. Stewart, Clerk

In the District Court of the United States
for the District of Columbia

Habeas Corpus No. 2067

WILLIAM D. PELLEY, *Petitioner,*

vs.

JOHN B. COLPOYS, *Respondent.*

Depositions for Petitioner

Asheville, N. C.
March 26, 1940

311 Filed Apr 1-1940 Charles E. Stewart, Clerk

In the District Court of the United States
for the District of Columbia

Habeas Corpus No. 2067

WILLIAM D. PELLEY, *Petitioner*,

vs.

JOHN B. COLPOYS, *Respondent*.

Asheville, N. C.
Tuesday, March 26, 1940

Be It Remembered that the following depositions were taken at Suite 410, Medical Building, Market Street, Asheville, North Carolina, at 11:00 o'clock, A. M., Tuesday, March 26, 1940,

Before Marie Shank, a Notary Public in and for the County of Buncombe, State of North Carolina, there being

Present:

Franklin V. Anderson, Esq., and Joseph F. Ford, Esq., attorneys in behalf of the Petitioner herein; and

Hon. Theron L. Caudle, United States Attorney for the Western District of North Carolina, and W. R. Fran-
312 cis, Esq., Assistant United States Attorney for the Western District of North Carolina, attorneys in behalf of the Respondent herein; and

Robert R. Williams, Esq., and Thomas J. Harkins, Esq., for the State of North Carolina, at the request of the United States Attorney for the Western District of North Carolina, and at the request and by the appointment of the Judge of the Superior Court of the Nineteenth Judicial District of North Carolina; and

Marie Shank (the Notary Public above named), the shorthand reporter designated to function.

Thereupon, the following proceedings and transactions were had and testimony was taken:

Judge Zeb V. Nettles, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Anderson

Q. Your name is Zeb V. Nettles? A. That is right.

Q. And you are now one of the Judges of the Superior Court of this Circuit? A. Of North Carolina.

Q. At the time that William Dudley Pelley was tried, approximately five years ago, what was your official
313 capacity? A. I was Solicitor of the Nineteenth Judicial District for the State of North Carolina.

Q. And you were the Solicitor prosecuting him? A. Yes, sir.

Q. Judge Nettles, who prepared the statement delivered by you from the bench at the time you ordered the capias for Pelley's arrest? A. Well, now, gentlemen, if you are on a fishing expedition, why all right. If you want to stick to the record here, I will be glad to answer any question that you may direct. The statement that I made at that time was prepared by me, at nobody's request or behest. Does that satisfy you?

Q. That is your answer. At the time you issued that capias, did you or did you not say that any action to be taken would be based on the second count, inasmuch as you regarded the first count as finally disposed of, with the payment of costs? A. It would not make any difference what I said about it, because the case was pending in the Court there and should be disposed of, and therefore I ordered a capias issued and set the hearing before Judge Warlick, who presided at the trial of the original case, because of the fact that I felt that I was disqualified to hear the matter, inasmuch as I had been the Solicitor at the time he was prosecuted.

314 Q. You issued it, then, because the case was there and you felt it should be disposed of? A. That is right; and I felt that, in justice, that the matter ought to be heard and finally disposed of.

Q. Did anyone inform you of any activities on the part of Pelley which you considered not of good behavior? A. Well, I had certain information as to his activities.

Q. Was it based on information or was it of your own personal knowledge?

Objection by Respondent.

A. I don't think that has got anything to do with it. I don't mind answering it. It was based on my own observation and also information.

Q. Did you ever discuss the Pelley case with Congressman Martin Dies or anyone on his committee?

Objection by Respondent.

A. I don't think that has got anything to do with it. I have never, prior to the time this capias was issued, I don't think I ever discussed this case for the last three or four years with anyone.

Q. Have you discussed it with Congressman Martin Dies or any of his committee since then?

Objection by Respondent.

A. I don't know. I have discussed it with one or two gentlemen.

Mr. Francis: Let me interrupt the proceeding for
315 a minute.

The United States Attorney's Office, Mr. Theron L. Caudle and W. R. Francis, Assistant United States Attorney, appear here in this hearing representing the Respondent. We are appearing here aiding Honorable Thomas J. Harkins and R. R. Williams, of Asheville. At this point, we object to this line of questioning for the reason that at the hearing in Washington when Mr. O'Connell requested that the hearing be postponed he stated to the Court that the purpose of his request was that certain records sent to Washington by the Governor of North Carolina were spurious and he wanted to ascertain whether or not those were correct. We think that to be the question material here in this hearing, and any other matters we think irrelevant, and we are objecting to going into such questions.

Mr. Anderson: Well, there is no one here who has any authority to pass on any objections, and such questions as are objectionable, when the objection is noted, will be taken into consideration by the Judge when the depositions are read, and such testimony as is objectionable will at that time be excluded from the record.

Mr. Francis: Why put it in here if it is to be excluded?

You gentlemen know the procedure and know what
316 is material, and we are insisting that you confine yourself to that point. Now, we don't care to re-try Mr. Pelley, and the only question here is whether he ought to come back to North Carolina and have this passed on by the Courts here, and we don't propose, without objection,

to go into this far field of evidence here that counsel is now purporting to bring out.

Mr. Anderson: You have a perfect right to your objections and to have them noted, but we have a right to ask such questions at this hearing, and to have them passed upon at the proper time.

Mr. Francis: If counsel persists in the procedure, we shall request that this hearing be postponed until we have an opportunity to present the matter to the Presiding Judge in the District of Columbia for the purpose of confining this hearing under Rule 30-B, of the Rules of Civil Procedure for District Courts of the United States.

Mr. Anderson: You have made no motion seasonably in this case. If you wanted to do this, you would have had to make your motion seasonably. "After notice is
317 served for taking a deposition by oral examination, upon motion seasonably made."

Mr. Francis: But we haven't had an opportunity to do that. You secured your continuance on the theory that you were going to show those records to be false, according to your own statement. Now you are absolutely leaving that point and trying to go into a field that was tried out here and gone into five years ago.

Mr. Anderson: What right have you to anticipate what I am going to show?

Mr. Francis: I submit here also that questions of counsel in this connection certainly are misleading to every person concerned in it. It is misleading to the Court for you have made the statement that you wanted to show that we had spurious records. We have present here the Clerk of the Court and the Deputy Clerk who has had charge of the records all the while. If you care to follow the point that you presented to the Court and that on which you got a continuance of the hearing at that time, we are ready to go into that.

Mr. Anderson: Were you there at the time we got a continuance of the hearing?

Mr. Francis: No, but I can read plain English.

318 Mr. Anderson: You can read plain English—what do you mean by that?

Mr. Francis: I mean that your counsel made that statement, according to the records.

Mr. Anderson: Is that all the statement he made?

Mr. Francis: No, he made a lot of statements. I am claiming that was the statement he made on which you secured a continuance.

Mr. Ford: It is a question of construction.

Mr. Anderson: There is no one here to pass on it. You can make objection and put it in the record and we will take it up there.

Mr. Francis: We are going to make a motion that this be suspended if you go into that wide field. If you want to stay here two or three days, that is all right. In other words, we want you to pursue on the theory that you had in mind when you had this case continued.

Mr. Anderson: I don't see how you can say what I had in mind when I had this case continued.

Mr. Francis: I think you stated what you had in mind, and if you did, the record shows it.

Mr. Anderson: It so happens I wasn't there, and neither were you.

Mr. Francis: I am talking about your counsel,
319 Mr. O'Connell; and I have a letter here from the United States Attorney of Washington City who was present at this hearing, stating what took place.

Mr. Anderson: Your inference that I may have been there—

Mr. Francis: I am talking about counsel. I don't know whether you were there.

Mr. Anderson: I thought you said you had a correct statement of who was there.

Mr. Francis: I said a correct statement of what took place. You may not have been there. Mr. O'Connell was there, according to the record.

Mr. Anderson:

Q. Judge Nettles, were you ever approached by anybody who urged you to issue a capias against W. D. Pelley?

Objection by Respondent.

A. No.

Q. Did you ever hear that Pelley had criticized you as prosecutor?

Objection by Respondent.

A. That don't make any difference. Yes, I think he wrote something in his—what they call his paper?

Mr. Ford: Liberation.

Witness: I would not call it Liberation. Everybody knows what it was. I read something out of there.
320 I believe that was the time I read it where he said there wasn't anything happened to him; that the present District Attorney was of his counsel, and he knew they couldn't do anything with him. I believe that was the time I read it. The present Solicitor of the Nineteenth Judicial District.

Mr. Anderson:

Q. Is it not a fact that your activities in the Pelley case are motivated by personal animosity?

Objection by Respondent.

A. Not a bit in the world. Don't object to that. Not a bit in the world.

Q. Have you ever had a conference— A. The reason I say that, I know what my own feeling is in the matter, and for fear that might be said about it, I would not even pass on it. I ordered a capias issued and ordered it set before Judge Warlick. Because your man said there in Court—Mr. Pelley said there in Court that he was a fine, outstanding Christian gentleman.

Q. Who said that? A. Mr. Pelley, in open Court; and that he had received a fair trial at his hands.

Q. You would not say that he was not those things? A. Judge Warlick? No, sir, I think he is. I think he is a fine, outstanding Christian gentleman, and a fine
321 judge.

Q. Did you ever have a conference prior to the Pelley trial with either or all of the following named persons: Kartus, Williams, Harkins and George Anderson? A. No, sir. That is, not about this case. If any of those gentlemen are lawyers they have conferred with me about lots of cases, both while I was Solicitor and while I was Judge. But they never conferred with me about this case after the trial of the case was had in Superior Court.

Q. Did you ever consult them at the time or before you were prosecuting this case?

Objection by Respondent.

A. I expect I have.

Q. Regarding the Pelley case? A. I expect so. I asked both of them to assist me in the trial of the case because they were familiar with the transaction, and under the laws of North Carolina we are not provided any help, but we have to do the best we can in the prosecution of cases.

Q. Did you not have many conferences with attorney Alvin Kartus during the trial of this case? A. I don't believe I ever had one, even.

Q. Did Alvin Kartus furnish you with information to assist in the prosecution of the Pelley case? A. Well, now, gentlemen, I am not going to answer any more of these questions. I have already answered all I am going
322 to answer. It is a fishing expedition. and what happened five years ago hasn't got anything to do with it, anyhow. If it is publicity you are after—

Q. We are not looking for publicity. A. Oh, I know that. I know you would not be guilty of that, at all. I agree with you.

Q. Thank you, sir. I am going to ask you if you refuse to answer— A. I have already answered.

Q. Did you or not state in open Court on the day of Pelley's sentence or just prior thereto that you would be satisfied with Pelley's paying the costs of Court, but due to the fact that he had previously publicly criticized you, you felt that he should pay a $1,000 fine?

Objection by Respondent.

A. I don't know where you got that, brother. Whatever I said, I said, and you have got a copy of it and it speaks for itself; and that wasn't in it, because I didn't propose to pass on it and would not pass on it.

Q. Do you deny saying that?

Objection by Respondent.

A. Why, no, I didn't say it. It would not make any difference if I did say it.

Q. Was there anything said between you and counsel for Pelley, or between you and counsel for Pelley and the
323 Court, that Pelley was being sentenced on one count only?

Objection by Respondent.

A. The record speaks for itself; the judgment there.

Q. What specific act of Pelley's caused you to issue the capias?

Objection by Respondent.

A. The record speaks for itself.

Q. What specific law of North Carolina did Pelley violate that justified the issuing of the capias?

Objection by Respondent.

A. The record speaks for itself.

Q. Judge Nettles, do you want to give any more specific answer than that the record speaks for itself? A. No, sir.

Q. What laws of the State of North Carolina did Pelley violate that justified the issuing of the capias?

Objection by Respondent.

A. The record speaks for itself. You have got that in the record.

Q. Had Pelley done anything during the year 1939 that he hadn't been doing, to your personal knowledge, immediately preceding the year 1939?

Objection by Respondent.

A. I don't know what Brother Pelley had been doing. I had more to do than to keep up with the gentleman.

Q. Then you issued a capias without knowing what Pelley had been doing?

324 Objection by Respondent.

A. I issued capias because the case was there on the docket, and on account of personal information which I had with reference to the matter, it ought to be disposed of, and I thought in justice that the matter ought to be finally disposed of in this County.

Q. Then, Judge Nettles, why did you continue the thing for five years? A. I did that because your man was a fugitive from justice and refused to come into Court.

Objection by Respondent to the questions just asked Judge Nettles on the grounds that counsel had no right to go into the motive of the Court in issuing the capias or what information the Court may have had.

Q. Did you discuss with any of the following named persons the issuing of the capias for Pelley prior to its issuance: R. R. Williams, Alvin Kartus, Congressman Martin Dies, Investigator Barker of this committee, or Congressman Zebulon Weaver of North Carolina?

Objection by Respondent.

A. I did not. I have already answered that once. This capias was issued on my own motion, without the request or at the behest of anyone.

Q. Was any complaint filed with you by the Com-
325 missioner of Corporations of North Carolina relative to any violation of the law by Pelley?

Objection by Respondent.

A. I have already answered that. I told you nobody requested me to issue a capias.

Q. Did you ever confer with attorney Alvin Kartus relative to the imposition of sentence on Pelley at any time during 1939? A. I will say that I never conferred with Alvin Kartus about this case at any time that I am conscious of at the present time.

Q. Is it not a fact, Judge Nettles, that you issued a capias against Pelley despite the fact that you were advised by the Solicitor of Buncombe County that there was no justification in law for the issuance of such capias, because there was no evidence that Pelley had violated the law?

Objection by Respondent.

A. I did not confer with the Solicitor of the Nineteenth Judicial District, but he, on the contrary, requested me, after the capias was issued, on account of his former connection with the case, requested me to appoint Mr. R. R. Williams and Mr. T. J. Harkins to prosecute the matter in Court, to save him embarrassment.

Q. You deny, of course, that the capias— A. Now, brother, I am not denying anything—don't start out
326 about denying.

Q. No, you are standing on the record. I will put it in a different manner. Did the issuance of capias for Pelley result from any discussion by you with a member of the Dies Committee?

Objection by Respondent.

A. No.

Q. On what day of February, 1940, did you sign order extending the period of Pelley's suspended sentence for five years?

Objection by Respondent.

A. The record is there. I can't tell you what hour. If you will look at the record, you will find that. I didn't look at the watch or calendar on that date.

Q. Was it the first day of the February term? A. I can't tell you that. The record speaks for itself down there.

Q. By what authority of law was said additional period of five years suspended sentence entered in the Court records? A. You can find that in the laws of the State of North Carolina.

Q. Did you examine them before you issued it? A. Yes, sir.

Q. Do you remember if it was issued during the February term?

Objection by Respondent.

A. The record speaks for itself. My recollection is it was issued during the February term, because I
327 think I held the February term of Court in this County.

Q. As a matter of fact, isn't it in the law of North Carolina that no suspended sentence shall be continued for a greater period than five years?

Objection by Respondent.

A. If it is, then you, being a lawyer, ought to know about that without asking me.

Q. I was under the impression that it is. You say it isn't. A. If you are a lawyer, you ought to know what the law is without asking me about it.

Q. Why did you refuse to sign the minutes incorporating your speech at the time you issued the capias?

Objection by Respondent.

A. No. We never incorporate remarks of Court unless somebody is dead; some memorial exercises, etc.

Q. Did you sign those minutes? A. I signed the minutes of the February term.

Q. Was that speech incorporated? A. The Clerk of the Superior Court keeps that. I would say not, because it would be extraneous matter.

Q. You would not know? A. I would say it was not, is not, part of the record, what I said down there.

Q. Was the issuance of capias inspired by any personal animosity on your part against Pelley?

328 Objection by Respondent.

A. I have already answered that; that I had no animosity toward him; haven't now; don't have any animosity now; didn't have any then; didn't have any when I got through trying him.

Q. Do you feel that you could weigh, fairly and impartially, whether or not capias should be issued against Pelley—

Objection by Respondent. That is not a matter of judgment in the case; not a matter of discretion but a matter of law. It is not a matter of discretion. You issue a capias and then it has to be heard in open Court on whether or not he has violated the terms thereof. That is a fact to be determined by the Court itself.

Q. I didn't finish my question. I ask you if you feel you could fairly and impartially weigh the question of whether capias should be issued against Pelley when you were prosecutor at the time of the trial?

Objection by Respondent.

A. I have answered the question.

Q. Has the publication by Pelley of any pamphlet since the date of trial violated the laws of the State of North

Carolina, to your personal knowledge? A. I wasn't interested enough to read his writings.

329 Q. Did he violate the Federal law?

Objection by Respondent.

A. You might ask Mr. Roy Francis that.

Q. He is not on the stand. A. To tell you the truth, I don't know. I didn't read them. I was not interested in the pamphlets enough to read them, and whether or not he violated the Federal law against fraud and corruption, I don't know; can't tell you.

Q. Where did you get your information, Judge Nettles, if you didn't read—

Objection by Respondent.

A. That rests in the bosom of the Court, brother; and you and no other power that I know of can make me divulge that information, unless I wanted to, but I have no disposition to hide anything that I know of in the matter.

Q. Did you sign an order on the 19th of October, 1939, directing the Sheriff of Buncombe County to take into possession any material or thing of any nature whatsoever, wherever the same may be found, which may be of any materiality to this case, or any other criminal action against said W. D. Pelley, of any nature whatsoever, and hold and preserve said material or thing or things as evidence until further orders of this Court?

Objection by Respondent.

A. I signed an order of record in this case, and

330 it speaks for itself.

Q. Was it dated the 19th of February?

Objection by Respondent.

A. I don't know when it was dated.

Q. You did issue an order? A. I signed an order, which is of record.

Q. By what authority of law did you issue such order?

Objection by Respondent.

A. You being a lawyer practicing in North Carolina ought to know what the law is.

Q. I am not so learned in the law as Your Honor. A. This is not a law school. We have an awful good one at Wake Forest and Duke and Carolina, and probably at the A. T. & T. I believe they are going to start one at Greensboro, and if you want some information about what the law is, I would suggest that you go down and confer with those gentlemen.

Q. Do you know of your personal knowledge, or through a return made by the Sheriff of Buncombe County, or from information derived from him, that the said order was carried out?

Objection by Respondent.

A. I know nothing about it. I saw some records down there, and I believe Mr. Ford told me something about it—
Mr. Pelley's lawyer—but I don't recall what Mr.
331 Ford said about it, and I saw some files, etc., at the
Courthouse, but I don't know what they were, having other things to do.

Q. You don't know whether the Sheriff seized anything under that order?

Objection by Respondent.

A. Not of my own personal knowledge. I wasn't there. Judges down in this District don't follow the Sheriff to see whether or not they carry out the orders of the Court. I don't know whether that is customary in other places, but never where I have been, it is not customary.

Q. Did you inspect any of the records or correspondence —private records—after seizure was made, if it was made?

Objection by Respondent.

A. I might have seen one or two of them. I don't recall now what they were; out of mere curiosity.

Q. Is that order to the Sheriff now part of the Court records? A. I presume it is. Mr. J. E. Swain, Clerk of the Superior Court, has custody of those and he can tell you about that. I have got no personal information as to what is in the file.

Q. Do you know why copy of this order was not sent to Washington with the capias and other papers?

Objection by Respondent.

A. No, sir, I can't tell you that.
Q. You know it wasn't?

332 Objection by Respondent.

A. I don't know whether it was or wasn't.
Mr. Anderson: I would like to know on what you base that objection.
Mr. Caudle: We are noting these objections on the ground that you are not attacking the record.

Mr. Anderson:

Q. Was memorandum ever furnished you by Solicitor Wells after his trip to Washington and the World's Fair in New York— A. After what?
Q. After Solicitor Wells went to New York to the World's Fair, did he bring back a record or memorandum to you from Congressman Zebulon Weaver?

Objection by Respondent.

A. No, I didn't know that the Solicitor had enough money to go to the World's Fair.
Q. I understood the Dies Committee paid for it; paid for his trip up there—part of it, anyway. A. I can't answer that. He didn't furnish me any memorandum about it.
Q. Judge Nettles, why did you issue a capias for Pelley and not one for Summerville?

Objection by Respondent.

A. That also rests in the bosom of the Court, and I consider it a matter of discretion in this case, and it is
333 not a subject of inquiry by you or anyone else.
Q. Summerville was put under the same conditions?

Objection by Respondent.

A. The record speaks for itself. I don't think so. My recollection is there wasn't anything done with Summerville or—what is the other boy's name? Two other defendants. Merely scapegoats or tools of Pelley, from the evi-

dence down there. We all agreed to that—even his counsel, Mr. Jordan.

Q. You are not familiar enough with conditions of the order to know whether they both did have the same conditions?

Objection by Respondent.

A. The record speaks for itself.
No Cross-Examination.

ZEB V. NETTLES

By MARIE SHANK

334 **Mr. R. R. Williams**, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Anderson

Q. Mr. Williams, what is your full name, sir? A. Robert Ransom Williams.

Q. You are an attorney of the Asheville Bar? A. I am.

Q. At this time, you are one of the counsel representing the State in this case against Mr. Pelley? A. Without my knowledge or consent, I was appointed by Judge Nettles, along with Mr. Thomas J. Harkins, as Special Prosecutor in this particular matter. The first information I had that the appointment had been made was an article I saw in the newspaper to that effect, and later I was informed that it was because the Acting Solicitor was counsel for Mr. Pelley at the time of his trial and did not want to be embarrassed about the matter to take any part in it, and that therefore Mr. Harkins and I had been appointed by the Judge as Special Prosecutors representing the State in this particular matter.

Q. It was without your knowledge and consent? A. Absolutely without my knowledge and consent.

Q. You have, of course, consented to it since? A.
335 I have.

Q. And you don't know upon whose solicitation the appointment was made?

Objection by Respondent.

A. Not except what Judge Nettles said: that he made it of his own volition and motion; and I think he said at the request of the Solicitor. I am not certain about that.

Q. You have represented—you have had a good many cases against Pelley, have you not?

Objection by Respondent.

Q. In the last five or six years? A. I will testify to any matter pertaining to the record, material or competent in this case. I will not consent to the deposition being taken under representation of counsel that it will be taken to attack a spurious record and then take advantage of that and come down into this Court and go into matters under other conditions. I expect to be present at the trial of the case before the Judge of the District Court of Columbia, and any competent or material questions that will be asked there, I will be glad to answer.

Q. When you say "come down to this Court," what Court do you mean? A. I mean into this jurisdiction.

Q. Were you in the early part of 1934 approached by anyone residing outside of Asheville who solicited
336 you to take a case against W. D. Pelley?

Objection by Respondent.

A. I make the same answer that I did before, that the counsel who are now asking those question know that under the decisions of the Courts throughout the land they are not proper or competent questions, and he is taking advantage of the absence of the Court to get something into the record here which is entirely improper.

Q. What Court am I taking advantage of? A. The Court of the District of Columbia.

Q. You feel yourself competent to pass upon whether I am taking advantage of the District of Columbia Court?

Objection by Respondent.

A. I say that I have answered the question.

Q. Mr. Williams, did a person by the name of Kahn, or anyone else from New York City, approach you with a proposition to take a case against Pelley?

Objection by Respondent.

A. I decline to answer the question because it is improper, and counsel asking it knows it is improper, and I will be present at the trial of the case in Court, and submit myself to the Judge of the District Court of Columbia.

Mr. Ford: Mr. Williams can take advantage of any privilege he has without criticizing counsel on the
337 other side or making statements as to the intention of counsel on the other side or attempting to impugn their character and standing. I think that is highly improper for him to put that in the record. We assume that Mr. Anderson who is asking the question is a man of good character the same as Mr. Williams and Mr. Harkins or myself or anybody else; and I don't think Mr. Williams should make an explanation there and use opprobrious epithets with respect to Mr. Anderson's trying to take advantage of the Court or doing a sharp practice or doing something that Mr. Williams objects to. If he has privileges he can stand on those privileges without criticizing or lecturing the lawyer on the other side, who has some rights, even if he does represent Mr. Pelley.

Mr. Francis: In answer to Brother Ford's statement, Mr. Williams is not reflecting on the gentleman's character or on his intentions here. It is not the purpose—

Mr. Ford: He said counsel knows that is the purpose.

Mr. Francis: Wait until I get through. It is not Mr. Williams' purpose. He reiterated that counsel who
338 is now propounding questions knows what is competent, and I submit that he knows that such questions are not competent; not in this Court, not in his Court in the District of Columbia, or in any other Court over which a Judge presides; and why he persists in continuing with it after he has heard our objections, we don't understand. We again object to it, and for the further reason that the witness has stated that he will be in the Court that issued the process that you are now serving under, as a witness, and you can call him there to testify if you wish to, and we submit that it is not proper to take his statement here before the Commissioner. Because you are entitled to take a deposition when you live more than 75 miles away from the Court, or sickness or special emergency.

This witness has stated that he will be in Court at the time, if he wishes that information.

Mr. Ford: That doesn't answer our criticism that Mr. Williams is taking advantage of the questions asked him. Now we ask that this matter be proceeded with in the same way as the taking of all other depositions. The wit-
339 ness is required to answer. If you want to make objection, make it. Make it before the Court rules on it, and the stenographer, or Commissioner, here has no right to rule, and you can only make your objections. The witness will answer, and then the Court will say whether it is proper evidence or whether it should be excluded under your objections. Now, Mr. Francis knows that rule of taking depositions as well as I do, because it is generally practiced in the State and Federal Courts.

Mr. Francis: Ordinarily, you are correct, if you are inquiring into the guilt or innocence of the defendant. You are not so doing in this proceeding. You are inquiring whether or not this man ought to come to North Carolina.

Mr. Ford: No, sir, whether or not W. D. Pelley is entitled to a writ of habeas corpus; that is, to turn him loose from this capias. Then it is a question for somebody else as to whether he comes back here. It is not a question here as to whether he is guilty or innocent of this charge that is against him in that capias. It is not a question as to whether or not he is charged with some other offense.

340 Mr. Francis: May I remind Mr. Ford and counsel that Mr. Pelley has been convicted by a jury of Buncombe County five years ago, and that action is still pending in this Court.

Mr. Anderson: We say it is not.

Mr. Ford: It is a question for the Court to say whether it is still pending, and that is why the witness has got to answer the question and let the Court rule on the competency or incompetency.

Mr. Francis: If you will propound such question, we will offer no objection.

Mr. Ford: I don't suppose Mr. Anderson is asking counsel on the other side as to what question he shall propound to the witness.

Mr. Anderson: I certainly am not.

Mr. Francis: I shall make this statement now: that we shall apply to the Commissioner for a postponement of

this hearing until we have an opportunity to present the matter to the Judge for the purpose of confining this inquiry to the question before the Court; that is, as to the correctness of the record submitted from the State of North Carolina to the Court in Washington City. I shall not press that motion until you have completed with the
341 witness now on the stand—Mr. Williams.

Mr. Ford: I take the position that the defendant has no right to request a postponement when he refuses to answer questions. The only person having the right is the party taking the deposition, to file a petition with the Judge of the District requiring the defendant to answer the question. That is the only one I understand has the right.

Mr. Francis: There is another rule you better get familiar with.

Mr. Ford: What rule is that?

Mr. Francis: 30 (b), Federal Practice.

Mr. Anderson: That is the one we are going by.

Mr. Francis: After this witness, I am going to insist on the motion; and I will have an order out of Washington I hope before very long.

Mr. Anderson: Are you through for the time being?

Mr. Francis: Yes, for the time being.

Mr. Anderson:

Q. Mr. Williams, was there any discussion between you and any other person relative to taking some action to suppress Mr. Pelley's publishing activities?

Objection by Respondent.

No answer.

342 Q. I will repeat the question. Was there any discussion between you and any other person relative to taking some action to suppress Mr. Pelley's publishing activities?

Objection by Respondent.

A. I decline to answer that question, not because it is embarrassing at all, but because I consider it improper and immaterial and incompetent and impertinent and taking advantage of the position by counsel to ask any questions of that character at all; and the further statement that I will be in Court at the trial of this case.

Q. I hope so. Did you ever represent any creditors of Mr. Pelley or his organization?

Objection by Respondent.

A. I make the same answer to that question that I made to the previous question.

Q. Did you ever make demand on any member of Pelley's organization for the payment of any bill or account? A. I make the same answer.

Mr. Francis: Are you trying a civil action or criminal?

Mr. Anderson: A habeas corpus. I believe that is in the nature of a civil action.

Q. Did you ever, as attorney for one of Mr. Pelley's creditors, refuse to accept payment from Mr. Harry Seiber of the amount of a default judgment against Mr. Pelley?

A. I make the same answer to that that I made to
343 the other.

Q. What was your answer to the other?

Reporter reads answer as follows:

"I decline to answer that question, not because it is embarrassing at all, but because I consider it improper and immaterial and incompetent and impertinent and taking advantage of the position by counsel to ask any questions of that character at all; and the further statement that I will be in Court at the trial of this case."

Q. Did you apply for a receivership for Mr. Pelley's printing concern in 1934?

Objection by Respondent.

A. I make the same answer.

Q. Did you ever confer with Congressman Kramer or anyone else on the MacCormick-Dickstein Committee relative to Pelley's affairs in 1934?

Objection by Respondent.

A. I make the same answer.

Q. Were you ever in the employ of the MacCormick-Dickstein Committee?

Objection by Respondent.

A. I make the same answer.

Q. From what source did you receive your compensation for the prosecution of Pelley?

Objection by Respondent.

A. I make the same answer.

344 Q. Mr. Williams, did you receive your compensation from the State of North Carolina or from some private individual?

Objection by Respondent.

A. I make the same answer.

Q. Did you ever confer with Investigator Barker regarding Pelley's affairs after Mr. Pelley's arrest in Washington on February 10, 1940? That is, Mr. Barker of the Dickstein Committee?

Objection by Respondent.

A. I make the same answer.

Q. As a matter of fact, you have had cases against Pelley a good many times from many different clients, have you not?

Objection by Respondent.

A. I make the same answer.

Q. You have spent most of your time for the last five years trying cases against Mr. Pelley?

Objection by Respondent.

A. I make the same answer.

No Cross-Examination.

ROBERT RANSOM WILLIAMS

345 **Mr. J. E. Swain**, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Ford

Q. Mr. Swain, you are Clerk of the Superior Court for Buncombe County? A. I am.

Q. How long have you been Clerk? A. Since 1934—July.

Q. You were Clerk at the time Pelley was tried the first part of 1935? A. I think I was, yes, sir.

Q. Do you have the original of Judge Warlick's judgment in that matter? A. I don't know. I would have to examine the records. I am the custodian of the records.

Q. You have the transcribed judgment, haven't you? A. I have the records upon which the judgments appear, yes, sir.

Q. Now, you could furnish a copy, certified copy, of that judgment, could you not— A. Oh, yes.

Q. To attach to your deposition? A. Oh, yes.

346 A certified copy of the judgment in the case of State v. Pelley et al is hereto attached and marked "Pelley Exhibit A," and made a part of this deposition.

Q. Now, you recall, Mr. Swain, last October, I believe, during the criminal term of Court that Judge Nettles issued a capias for Mr. Pelley, do you not?

Objection by respondent.

A. He ordered a capias to be issued.

Q. Well, capias was issued in conformity with his order? A. That is correct.

Q. Have you got a copy of that order and capias in your files? A. I should think so, yes, sir. I am speaking now without looking at the records. I assume it is there, sir.

Q. Will you look in your records, and if you find copy of the capias and also copy of the order authorizing the issuance of the capias, certify to it and attach it to your deposition here, or give it to Miss Shank? To be marked "Exhibits B and C." A. The order—as a rule the order for capias is not a written order.

Q. But it is returned to the Clerk by the Sheriff? A. The order for capias is usually not a written order. I don't know whether Judge Nettles signed a written order.

Q. Well, if he did? A. If he did, I can furnish it.

347 Q. If he did not, will you certify that no order in writing was made? A. I will certify nothing that is not. I will certify anything that is.

Q. You would not issue a capias without order of the Judge? A. No, but it may be oral; it usually is.

Q. It appears on the minutes somewhere? A. Yes, sir; order for capias. I can give you that. I will have a minute of the order, and I will have the capias.

Q. That is what we want. Now, Mr. Swain, it appears that in February, about the 19th, 1940, an order extending the suspended sentence was made by Judge Nettles at the February Criminal Term of Court. I want a copy of that order, certified copy, attached as "Exhibit D." Now, Mr. Swain, do you have any record, or is there any record on your minutes, of the October term of Court, or the February Criminal Term of Court, that is in writing, containing the remarks made by Judge Nettles at the time of ordering the issuance of capias, or at either term of the Court, and if so, we want a copy of that—certified copy. A. You want to know whether or not there is any statement made by Judge Nettles at the time he ordered that capias issued, on our minutes?

Q. Yes. A. I don't know.

348 (Off the record)

A. (Continued) If there is anything on the record, I will be glad to furnish it. I don't know whether there is or not.

Q. I understand. A. But we are required to record proceedings, or make a minute of the proceedings. If it is a statement made by the Judge that is not signed by him, we make a minute of the content, but we don't record it; unless it is signed by the Judge. I will see if we have it.

Q. But you do—if it is signed by the Judge, you put that statement in the papers? A. If we have upon our minutes statements—any statement—I will give it to you.

(Off the record)

Q. What I am trying to get is, if that written matter appears in the envelope in the Pelley case, and purports to refer either to the issuance of the original subpoena in October, 1939, or the extension of the suspended sentence in February, 1940, I want you to merely certify that this paper was found in the envelope or Pelley papers, but you don't certify anything else relative thereto. A. Of course, if you want my certificate that I find a certain

paper, copy of it, in the records at this time, I can give it to you, but I can't certify that Judge Nettles or Judge anybody else ever read it or said anything about it unless my records show it, because I was not in Court.

349 I don't know whether he said it or not. I can certify this is in the files.

Q. That is all I want you to do; just the same as you could testify if you were on the stand whether you found those papers and what the papers contained. A. I will give you whatever you want out of the record or files, but I won't certify anything unless the record shows it.

Q. That is right. A. Now, that is the statement that you claim was issued in February that you want?

Q. In October or February; October, 1939, or February, 1940. I am inclined to think it appeared in the papers, newspapers, in October, 1939. A. You see, Mr. Ford, with respect to this matter—I will give it to you for whatever it is worth, but I would have no information as to who put it in there. I might say this: that this record has been examined a good many times since the trial, both by counsel for the State and by representatives of Mr. Pelley.

Q. Yes. A. And I can't vouch for anything that was in there.

Q. I understand. A. But I can say it is in there when I look, if it is.

Q. Do you recall at any time sending a copy of

350 that order directing the issuance of the capias to anybody in Washington, D. C.? A. No, I have no recollection.

Q. Do you remember receiving a request to send a copy of that order? A. I don't know that I ever did. I have no recollection of it. I have had a good many requests for records in this case. I don't recall that particular thing. I never saw the order, to tell you the truth; that is, personally.

Q. Mr. Swain, do you recall whether or not that capias subpoena has been returned to your office? A. No, I would have to look on the record for that.

Q. Will you look at your records and if has been returned, attach certified copy to your deposition? A. You mean the original capias?

Q. Yes, the original capias in October. A. I have marked down here copy of the capias.

Q. And order. A. You requested copy of capias issued in October. Is there another capias?

Q. No, that is the one. Then you have got down there copy of order directing issuance of capias? A. Yes, copy of my minutes showing the order.

Q. Yes, and copy of order, if order is in the papers.

351 Now, Mr. Swain, I understand there was another order issued about the same time or a few days afterwards directing the Sheriff to go out to Biltmore and enter and take charge of all the property, files, correspondence, printed matter, and anything that might throw any light on Pelley's conduct since his fine and suspending of sentence in February, 1935, or March, 1935, up to the date of the issuing of the order of seizure; and we want a copy, certified copy, of that order, together with the return of the Sheriff, showing what property the Sheriff took into his possession and what he did relative to the execution of that order and subpoena.

Objection by Respondent.

A. A matter of public record you can have, of course, if I can get it up; anything I have.

Mr. Anderson: Are you objecting to the question or to our having certified copy of the order of the Court?

Mr. Caudle: I was objecting more than anything else to the form of the question.

Mr. Williams: We object for all purposes.

Mr. Ford:

Q. Will you see if you can find that order, Mr. Swain, and return of the Sheriff on that order? A. I will look for it, yes, sir. You want the complete record?

352 Q. I want the order directing the Sheriff to go out there and seize this property and the Sheriff's return on it.

Objection by Respondent.

A. If I have it.

Q. I am pretty sure you have it; because the Sheriff would make a return of it.

Objection by Respondent to that statement being placed in the record; a voluntary assertion on the part of counsel, not substantiated by evidence.

Mr. Ford: You can cut out of there anything I said.

Mr. Francis: So far as this record is concerned, there is nothing concerning any order of seizure by the Sheriff, except in your questions.

Mr. Ford: That is what I want to show by the record. You say I am not privileged to do that?

Mr. Francis: I didn't say you were not privileged. Looks like you are a privileged character around here.

Mr. Ford:

Q. Now, of course, Mr. Swain, you don't know of your own knowledge that the Sheriff did seize any property out there?

Objection by Respondent.

A. Oh, no.

Q. You only know what your records there show? A. I don't know that yet.

353 Q. You can only know what the records there show? A. Naturally. I have no personal knowledge.

Q. And your certified copy will give that information? A. I will give you that.

Q. Now, Mr. Swain, does your record show that Mr. Pelley, during the past five or six years, has been charged with any criminal offense in the Courts of Buncombe County or, so far as you know, in the Courts of North Carolina?

Objection by Respondent.

Q. Or in the Federal Courts?

Objection by Respondent on the ground that the record speaks for itself.

Mr. Ford: I am asking if he knows of his own knowledge?

A. You want an answer to that?

Q. Yes, sir. A. I have not examined the record for any such information. I have no knowledge about it, one way or the other.

Q. Do you have a subpoena that was issued by the Court in Washington, D. C., that was served on you by the Marshal here? A. I have it, yes, sir. (Produces subpoena.)

Q. Will you look at your records and ascertain whether or not the records show any charge of a criminal offense against Mr. Pelley from February or March, 1935, up to the present time?

354 Objection by Respondent.

Q. And if you do, make a note of it and write it in as answer to this question that I will dictate in here:

Objection by Respondent.

A. As I understand it, you want any case against Pelley?

Q. Yes. A. The divorce case—you don't mean civil—

Q. I said criminal case. A. I will look only in the criminal docket, then.

Q. All right. I will dictate this question, and after looking at your docket, when you come to answer this, you can make a note as an answer to this question, if you find anything, and if not, you can just say no, or whatever you want to say. A. My docket does not show any criminal action against defendant since Feb. 1935.

Q. You will look into your records of the Pelley case and see whether or not you have the original order of October 19, 1939, directing the Sheriff of Buncombe County to seize whatever material might be found anywhere which would be of a materiality in this case or any other criminal action against Pelley, since February, 1935, up to and including February 22, 1940, and you will answer your question as to what your records show in the criminal action under this question, and attach such certified copies as to the order and return of the Sheriff and other matters as you

355 find records of in your office.

Objection by Respondent.

Q. Mr. Swain, do you know on what day of the week the February, 1940, term of Criminal Court began in Buncombe County? A. No, I don't know. It usually begins on the third Monday. I take it that is when it began.

Q. About the 19th? A. The Minute Docket would show.

Q. You can answer that question, also, from your Minute Docket. A. Feb. 19, 1940, Monday Exhibit "D" appears on Minute Docket for that date.

Cross-Examination

By Mr. Williams

Q. Mr. Swain, you and your office have authenticated a record in the case of State v. W. D. Pelley for the purpose is use in the extradition of Pelley? A. Yes, sir.

Q. State whether or not that authenticated copy furnished to the Governor is a true, perfect and correct copy of all the record in the case of State v. W. D. Pelley. A. Criminal action?

Q. Yes. A. Yes, sir; as we have had occasion recently to re-check that for the purpose of this examination. We checked it and found it is absolutely correct.

356 Q. True and complete? A. That is right.

Q. Mr. Swain, is it customary to put into a record remarks that a Judge may make from the bench when he is issuing an order? A. Not unless it is ordered by him to be put into the record. The Judge has full control of the record. We keep a minute of what transpires, but the Judge has control of the record, and if he wants anything put into the record as stated, he furnishes it and orders it put in.

Q. Is it a part of the record in the case of remarks, either written or verbal, that are not signed by him and ordered to be put into the record? A. Not unless he orders it put in. Of course, if it is part of a sentence, naturally it goes in, but it is usually signed by him so it will be accurate. Otherwise, we don't have a stenographer taking down everything the Judge says unless he orders it done. Then the Court reporter does that.

Q. But, as I understand, the remarks of the Court are not a part of the record in the case unless the Judge orders them to be incorporated into the record? A. That is correct, as I understand the rule; the rule we follow and have been following ever since I have had any connection with the Courts here, for the last few years.

Q. As I understand, you have checked this authenticated record again for the express purpose of preparing for this

examination and have found that that authenticated
357 copy is a true, complete and perfect record of the case? A. Yes, sir. When the original record was made we had some suggestion that there might be a mistake in it, something of the kind, and it was suggested, probably in Washington, that they wanted to examine us about that record, and of course we re-checked it and we found it is absolutely correct; no question about the record.

Re-Direct Examination

By Mr. Ford

Q. Mr. Swain, you didn't check any of your other records? A. What other records?

Q. The records I have asked for this morning. You didn't see whether you had those records, did you? A. Well, I take it we have some of them: the judgments.

Q. Did you check your records like you did the record you say you re-checked? A. You have asked for some of the records which we have heretofore certified; for instance, the judgment and the minute with respect to the ordering of the capias, and what we have there in those two items, particularly.

Q. I will ask you if the request for extradition sent to Governor Hoey did not contain the original indictment, the trial of the case and the judgment rendered—I mean the verdict of the jury—and the judgment rendered
358 thereon, together with the capias under which Mr. Pelley was apprehended and arrested?

Objection by Respondent. It is an authenticated record and speaks for itself.

Mr. Ford: You brought that out. You brought it out, and now you are trying to prevent us from getting something we are entitled to have.

Mr. Williams: I want it to be fair and open and I don't want any Court to be taken advantage of or misled. You have asked him what the authenticated record contains. The authenticated record speaks for itself as to what it contains.

Mr. Ford: I didn't ask him any such thing. I asked if it didn't contain the matters I asked him to furnish

us certified copies of. That is all I asked him. A. I assume that is true. Without looking at the record, I can't answer that question. I assume that is true. I don't recall everything that was put in the record.

Q. But usually that is what is put in the record? A. Yes, sir.

Q. When you ask for extradition. That is what is put in the record: indictment, trial, answer, issues and judgment? A. And something else.

Q. And subpoena. A. Organization of the Court
359 and bill of indictment and return of the Foreman and all like that.

Q. But the material matter is the indictment and arrest and trial, isn't it? A. I think it is.

Q. Now, Mr. Swain, I believe you stated that it was not customary for a Judge to put in the minutes statements made from the bench relative to the sentencing of a criminal, or person convicted before him? A. Not unless it is part of the judgment.

Q. Not unless it is part of the judgment? A. No.

Q. Now, then, it is customary for the Judge, before he issues the capias on the suspended judgment to take an affidavit to the effect that the defendant has failed to comply with the terms of the judgment, isn't it?

Objection by respondent.

A. Well, I know that is sometimes done. However, a Judge can either find a fact, and usually he does require something to base that on. On the other hand, the Judge of his own motion can order a capias issued. I have seen that done without any order or affidavit. For instance, where somebody under a suspended sentence has done something, frequently the Judge will order a capias issued for that person under the suspended sentence when anybody has requested it.

Q. But a Judge never of his own motion, that you
360 ever knew of, just out of a clear sky, without any knowledge or evidence upon which to base an order —you have never known a Judge to order a capias issued for the purpose of disposing of a criminal case before the time expires, without some evidence of a breach of the conditions under which the judgment was suspended?

Objection by Respondent.

A. I can't answer your question, because I have no knowledge one way or the other about that. I don't know that I have ever known anything like that. I can't give an answer satisfactory to myself.

Q. Mr. Swain, I will ask you if you don't know that it is customary when a Judge orders a capias to bring into Court a defendant where judgment has been suspended in a former case, that the Judge, if he doesn't know of his own knowledge of the breach, that he requires some proof in the way of an affidavit or oral examination under oath, he requires invariably some proof of the fact that the defendant has breached the terms of the suspended judgment?

Objection by Respondent.

A. I will say, Mr. Ford, that I know of no standardized form that Judges comply with. I mean by that, one Judge requires certain things and others others. There is no standard that I know of. I have seen Judges that required you to put things in writing when others would not require it. I don't know that there is anything
361 like that binds any Judge; certainly, not in this jurisdiction. I have never known of it. The Judge rules his Court, and if a matter is presented to him he will pass on it, or if he wants to make an order upon his own motion, he has a right to do it. I don't know. It is just a matter with the individual Judge. He controls it, as far as my experience goes.

Q. While you were in the practice of law, you frequently had to do with criminal matters in Court? A. Yes, sir, to some extent.

Q. I will ask you for the last thirty-five or forty years you didn't practice law in the Courts and handle a great many criminal cases? A. Yes, sir, but I want to state that you got your license the very time I got mine. Your question is what?

Q. You have never known of a Judge issuing a capias to bring a defendant formerly convicted and out on suspended sentence—you have never known a Judge to issue a capias without some ground in evidence for it?

Objection by Respondent.

A. I can't answer that question to save my life.

Q. I asked you if you ever knew in any case you appeared in that a Judge issued a capias without some evidence upon which to base the order? A. I would say I can't answer that, because I don't know what the
362 Judge has before him. I have had Judges repeatedly to order capiases issued. They don't issue the capias. They order the Clerk to issue the capias.

Q. I understand. A. You say the Judge issues the capias. He don't do it. He orders the Clerk to issue the capias.

Q. The Clerk would not do it without his authority? A. The Clerk issues the capias on the order of the Judge. I don't know what the Judge has in his mind. I was Solicitor about eight years, and the Judge ordered capiases repeatedly in various cases. I would not ask him why. But if he ordered the capias, of course it would be issued by the Clerk. I don't know what he has in his mind. It would be impertinent for me to ask, as prosecuting officer. I have asked a Judge to order capiases numbers of times, but have had them ordered when I didn't ask for them. But that was entirely with the Judge. I would not know why he ordered them. That is my only experience, Mr. Ford.

Q. He would not consult you before he ordered a capias? A. Lots of times he would not. But lots of times I have asked the Judge to order a capias and he would order it.

Q. I ask you if it isn't the general rule—

Objection by Respondent.

A. If there is a general rule, which I don't know, but as a general rule I guess that a Judge is requested for
363 a capias to be issued, for this reason: Judges travel from one district to another. The Solicitor lives in his district. Now, if the Judge is away, the Solicitor is supposed, of course, to know more about the cases than the Judge, who may be an entire stranger. So my experience has been that the Solicitor has more often asked for capiases.

Q. I ask you if that isn't the general rule? A. I would say that is my experience. As to whether it is the general rule, I would not swear to that.

Q. As a rule, the Judge usually acts upon information received from the Solicitor?

Objection by Respondent.

A. I didn't understand.

Q. The Judge usually acts upon information received from the Solicitor? A. Oh no, not that. I would not say that.

Q. When, Mr. Swain, does he act?

Objection by Respondent.

A. I imagine he acts upon information received from the Sheriff or from any reliable source. I don't know whether the Judge would put a suggestion of the Solicitor above one from the Sheriff or not, but as a rule he gets information that is satisfactory to himself.

Q. That is right. A. As to where he gets it, he doesn't put that into the record. He makes the order.

364 Q. But he does get reliable information to act upon? What I am trying to show, that a Judge just doesn't go down of his own motion and because the time for the suspension of judgment is about to run out, in order to get rid of the case, he doesn't go out and of his own motion have the man brought into Court to see whether he should pass sentence on him?

Objection by Respondent.

A. I doubt if he does. I think he would have to have some reason for it. That is my guess about it.

Re-Cross Examination

By Mr. Williams

Q. Mr. Swain, you know that Judge Zeb V. Nettles is a resident of this County? A. Yes, sir; a former Solicitor of this District.

Q. And at the time the capias was issued, the Solicitor was Judge Robert M. Wells, who was former counsel for Mr. W. D. Pelley? A. Yes, sir.

Q. The capias was issued under order of Judge Nettles in October, 1939? A. Yes, sir, that is correct, as I understand it.

Q. And a Judge will issue a capias of his own motion and you would not inquire into what information he had or his reasons for it? A. I have never asked a Judge
365 why. I take it that it is a matter entirely up to the Judge. I would not question that. I would not feel it proper. The presumption is that the Judge certainly follows the law. I would not question it.

Q. I believe you said that you were Solicitor—prosecuting attorney—in this District for eight years? A. Well, part of eight years; seven and a half. But I am not an expert on criminal procedure.

J. E. SWAIN.

366 *"Exhibit A"*

In the Superior Court

February, 1935 Criminal Term.

STATE OF NORTH CAROLINA,
County of Buncombe.

STATE

VS.

WILLIAM DUDLEY PELLEY

and

ROBERT C. SUMMERVILLE

Judgment

No. 13

For the purpose of judgment hereafter to be pronounced in the above entitled causes and the making of the record in the same, it appears that the trial of the matter above-entitled, consumed thirteen (13) full days and went over for final determination into the fourteenth day, the defendants, along with the two other companion defendants, having been charged in the bill of indictment containing 16 counts, with certain violations under the statutes Nos. 2059, etc., being the Capital Issues law of North Carolina, Chapter 149 Public Laws of 1927 and that at the conclusion of the evidence for the State, upon motion, thirteen of the original counts therein were dismissed and a ver-

dict of not guilty entered. That thereupon three counts were submitted to the jury, and in its verdict the jury returned a verdict of not guilty on another of the counts, leaving verdicts of guilty on two counts as against the two defendants Pelley and Summerville named above.

The judgment of the court is as to both defendants, the judgment being individual, that the defendant Pelley be confined in State's Prison at Raleigh, at hard labor, for a period of not less than one, nor more than two years.

The foregoing sentence of imprisonment is suspended for a period of five years, on the following conditions:

1. That the defendant Pelley pay a fine of One thousand ($1,000) dollars and the costs of the case, which bill of cost has been approved by the court as made up by the clerk, and which, under the authority of the
367 court is to include the total amount ordinarily for which the bill is made up by the clerk, together with the exact amount which Buncombe County has heretofore paid out for the expenses of the jury during the thirteen days and the expenses of the official court stenographer, it being the intent of the court to reimburse fully the county for each amount expended by it.

2. That the defendant be and remain continuously of good behavior.

3. That he not publish and (or) distribute in the State of North Carolina any periodical, which has to do with, or contain in it, any statement relating to a stock sale transaction or any report of any corporation as to its financial value, or with the purpose of effecting a sale of stock in said corporation, without complying with the capital sales issues statute. Judgment of the court, is as to defendant Summerville, that he be confined in the State's Prison at Raleigh at hard labor for a period of not less than one, nor more than two years. The foregoing judgment of imprisonment is suspended for a period of five years, on the following conditions:

1. That the defendant be and remain continuously of good behavior.

2. That he not publish and (or) distribute in the State of North Carolina any periodical, which has to do with, or contains in it, any statement relating to a stock sale transaction or any report of any corporation as to its

financial value with the purpose of effecting a sale of stock in said corporation without complying with the capital sales issue statute.

3. It appearing to the court that the costs of the whole case having been assessed in the judgment heretofore entered against the defendant William Dudley Pelley, there is no cost adjudged against the defendant Summerville. On count No. 2 against the defendants Pelley and Summerville, prayer for judgment continued for five (5) years.

WILSON WARLICK,
Judge Presiding

368 *"Exhibit B"*

Thursday, October 19th, 1939

STATE

VS.

W. D. PELLEY,

Court orders capias to issue and defendant placed under $10,000.00 bond.

ZEB V. NETTLES,
Judge Presiding.

369 *"Exhibit C"*

Buncombe County—In Superior Court.

CAPIAS.

STATE

against

WILLIAM D. PELLEY

STATE OF NORTH CAROLINA:

To the Sheriff of Buncombe County—Greeting:

We command you to take the body of William D. Pelley (if he be found in your county), and him safely keep so that you have him before the Judge of our Superior Court, at a Court to be held for the County of Buncombe, at the Court House in Asheville, N. C., on the 1 Monday after 2 Monday in November 1939, then and there to answer

the charge of the State against William D. Pelley on an indictment for Judgment upon conviction for felony.

Issued the 19 day of October, 1939

J. E. SWAIN,
Clerk Superior Court, Buncombe County.

Per EDWARD G. ROBERTS
Deputy Clerk.

370 No.....

STATE

VS.

WILLIAM D. PELLEY

Capias

To November Term, 1939
Fee ..... $.....
Mileage ..... $.....

$.....

Received October 19, 1939

Due search made and the defendant not to be found in Buncombe County or the State of North Carolina.

L. E. BROWN,
Sheriff

By C. M. GILBERT,
D. S.

371 "*Exhibit D*"

In the Superior Court

February A.D. 1940 Term.

NORTH CAROLINA
Buncombe County

STATE

VS.

W. D. PELLEY, ET AL,

Order

The undersigned Judge of the Superior Court finding as a fact that at the February, A.D., 1935 Term of the

Superior Court of Buncombe County, State of North Carolina, the defendant W. D. Pelley, was sentenced to be confined in the State's Prison, at Raleigh, at hard labor, for a period of not less than one nor more than two years, and the said sentence of imprisonment was suspended for a period of five years on certain conditions, the said sentence having been entered and suspension made on one Count of a Bill of Indictment on which the said W. D. Pelley was convicted; and the court also finding as a fact that on another count of said Bill of Indictment prayer for judgment was continued at said February, A.D., 1935 term of the Superior Court against the said defendant W. D. Pelley for five years; and the Court further finding as a fact that at the October A. D. 1939 term of the Superior Court of Buncombe County, State of North Carolina, the undersigned Judge issued a capias for the arrest of the said W. D. Pelley to be brought before the Court for the purpose of imposing sentence upon the said W. D. Pelley within the said period of five years, and also for the purpose of determining whether his suspended sentence should be put in effect; and the Court further finding as a fact that diligent and earnest efforts have been made by the Sheriff of Buncombe County and the law enforcement officers throughout the State of North Carolina and other States of the United States of America to find the said W. D. Pelley, and that notices for the arrest of the said W. D. Pelley have been sent to the law enforcement officers of many States of the United States of America; and the Court further finding as a fact that the said W. D. Pelley cannot be found within the State of North Carolina and has been and now is a fugitive from justice outside of the jurisdiction of North Carolina and is now resisting extradition to
372 this State, and that because of the flight of the said W. D. Pelley from the State of North Carolina and his becoming a fugitive from justice and concealing himself from officers, and his resisting extradition to this State, all for the purpose of avoiding the capias heretofore issued, this Court cannot now bring the said W. D. Pelley before it; and the Court further finding that the ends of justice require that suspension of the sentence hereinbefore mentioned be continued for a period of five years longer

from this date, and also that the prayer for judgment on the other count in said bill of indictment against the said W. D. Pelley be continued for a period of five years from this date and that alias capias issue from time to time until defendant shall be apprehended and brought before this Court.

It is, Therefore, Ordered and Adjudged that the suspension of sentence of said W. D. Pelley hereinbefore mentioned be continuted for a period of five years; and also that the prayer for judgment on said W. D. Pelley hereinbefore mentioned be continued for a period of five years; and that at any term of Court during said period of five years, judgment may be imposed on said W. D. Pelley, or suspended sentence may be put in effect, or both.

ZEB V. NETTLES
Judge Presiding over the Superior Courts of the Nineteenth Judicial District, State of North Carolina.

373 *"Exhibit E"*

At the February term, 1935, W. D. Pelley was convicted in this court for two distinct felonies, one for violating the Blue Sky Laws, and the other for a crime involving high moral turpitude, namely, that of making fraudulent representations. At that time information came to the attention of the court that Pelley was collecting sums of money from credulous people by playing upon their religious, racial and social prejudices and fears. It was suggested even at that time that he was being paid for his propaganda by sinister foreign sources. He pleaded for mercy and promised to lead a decent life.

Pelley was sentenced for one to two years in the State Prison on one of these convictions, but on account of these assurances, Judge Warlick, a humane and just Judge, suspended the prison sentence for five years upon payment of a fine of $1,000.00 and costs and upon condition that the defendant "Be and remain continuously on good behavior."

On the conviction for fraudulent representations prayer for judgment was continued for five years.

Since these convictions, this court has been informed Pelley has not only broken the promises which he made to the court, but has engaged in practices and propaganda which deserve the severe condemnation of all good American citizens. He has continued to pray upon and collect money from credulous neurotic people to his own enrichment by appealing to their basest religious, racial and social prejudices. He has attempted to reap financial profit by engaging in every possible form of un-American activities. He has levelled disgusting epithets against the office of the President of the United States. He has consorted with known enemies of American institutions. There are many reasons to believe that he is being paid from foreign and un-American sources. He is now said to be conducting his nefarious practices from some secret hiding place;
made afraid by his knowledge of his own wicked
374 misdeeds, to face in public his fellow American
citizens.

Here is a man enjoying the protection of our laws. He has deliberately violated our laws against crime. He is a felon. Such conduct on his part would in the country he professes to ape, admire, love and respect, forfeit his life. He deals in accusations, loud boastings, preens his feathers like a peacock and struts upon the stage of life, falsifying facts and hurling accusations. In his desperation to gain attention and occupy the spotlight, he has even accused our Great President of high crimes. He professes to be a friend of the American people and at the same time advocates class, racial and religious hatred.

It is not those from without that we must watch, but those so-called saviors of mankind who are preaching a doctrine deadly to American institutions. This defendant who has been moving in our midst seeking to further the cause of Nazism with himself as the Dictator, seeking to destroy justice and liberty and abolish all laws, living under the very protection of that law, he is seeking to overthrow and trying to undermine our system of government. Such a man cannot deserve the blessings of a government like ours. He is a menace to our society. Gratitude is one of the most beautiful attributes of human character. This man "smites" the hand that feeds him and has the unenviable record and distinction of being a contemptible ingrate.

We do not have to defend this system of government of ours from such an individual. For three weeks I sat here in this very courtroom and helped unravel a course of crooked dealing, thievery and stealing sufficient to damn any man, much less this contemptible seeker after notoriety, W. D. Pelley, so-called and self-styled leader of the Silver Shirts,—convicted felon—not now even a citizen. A Buncombe County jury says he is not, yet he would be our Dictator and would tell our country what to do.

375 We have diffused in this great land of ours well-being among the whole population to an extent without parallel in any other country in the world. We have furthered peace-keeping, peace-loving among our peoples; we have set a splendid example of the broadest religious toleration and freedom, and we have welcomed newcomers from all parts of the earth and have proved that they are fit for political freedom. These are some of the practical things we have accomplished. They are the triumphs of reason enterprise, courage, faith and justice over passion, selfishness, inertness, timidity and distrust.

In these days of trouble and of daily national emergencies, there is a comfort in the memory of Washington, Jefferson, Jackson, Lincoln, Wilson, and hundreds of other great Americans who gave their lives that our country might live. The zeal of justice, of learning and humanity lies deep in the American heart. Whenever a man tries to tear down the institutions of this great Democracy by boring from within, then I say that we should be on our guard and get to work. It is well to be a gentleman and a scholar, but after all it is better to be a man ready to do a man's work.

We have a man's work to do in making democracy work here in this nation of ours; to preserve its institutions, its freedom, its Christianity, is men's work. We must preserve and obey our laws. We must enforce our laws. We must be tolerant. We must be religious. We must do our utmost to carry on where our fathers and mothers left off in order to hand down to our children a better country, a better citizenship,—but eternal vigilance is the price of liberty.

W. D. Pelley has set up in our midst a printing press and is sending out to the country at large, messages devoted to bigotry, class and racial hatred, religious intoler-

376 ance, with the end in view of overthrowing our government. He owes a debt to society for his criminal conduct, having been heretofore convicted of two felonies in this country.

I direct you, Mr. Clerk, to issue a capias for the arrest of this man and have him brought before this court, Mr. Sheriff, to be dealt with under the law and justice. Mr. Sheriff, I hope that you will make every effort to apprehend this man and bring him before this court in order that he may make a bond in the sum of $10,000 dollars for his appearance before Judge Rousseau at the November term of this court.

Mr. Solicitor, I would not want to embarrass you at all in this matter and on account of your connection with the case with your permission I will request Mr. R. R. Williams and Mr. Thomas J. Harkins to present the matter whenever he is brought before the court.

377 In the Superior Court

STATE OF NORTH CAROLINA
County of Buncombe

I, J. E. Swain, Clerk of the Superior Court of Buncombe County, State of North Carolina, do hereby certify that the foregoing Judgment in the case of "State Vs. W. D. Pelley", Order of Court to issue Capias, Capias, Order Extending Suspended Sentence, are true and perfect copies as appears of record and on file in this office. I further certify that the attached paper writing, marked "Exhibit E", appears in the file of this office. I further certify that after an inspection of the records of my office I am unable to find any order directing the Sheriff to seize property of the defendant or any return of the Sheriff to such order.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this the 29th day of March, A.D., 1940.

J. E. SWAIN

(seal) *Clerk Superior Court, Buncombe County, North Carolina.*

378 **Mr. J. Y. Jordan, Jr.**, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Ford

Q. Mr. Jordan, you are a practicing attorney here? A. Yes, sir.

Q. Were you in 1935? A. Yes, sir.

Q. You represented a co-defendant by the name of Kellogg? A. No. I represented two defendants: Mr. Kellogg and Mr. Hardwick.

Q. You did represent Kellogg? A. Yes, sir.

Q. I believe the Court ordered a judgment of nonsuit as to both of them? A. No, sir, the jury acquitted both of my clients.

Q. Now, Mr. Jordan, do you know anything about the facts in regard to the trial of Pelley and Summerville? A. Yes, sir, I participated in conferences prior to the trial with counsel for Mr. Pelley and I participated in conferences when all defendants were present and all counsel were present.

Q. Now, after the trial of the case before Judge Warlick, and the jury convicted Pelley and Summerville on
379 two counts in the bill of indictment—two out of sixteen—were you present or did you talk with anyone with respect to the terms of the judgment in that matter?

Objection by Respondent.

A. I don't have any recollection of that. I was present when sentence was pronounced. My recollection is that the case required a little over two weeks to try and that the case went to the jury late in the afternon, and we went to supper and came back, and I believe the jury came in about nine-thirty or ten o'clock that night.

Q. And the motion for judgment was held open until next morning or the morning following?

Objection by Respondent.

A. That is my recollection.

Q. Now, what did you understand was the intention of Judge Warlick with respect to suspending the sentence and adjudging a fine in the matter?

Objection by Respondent.

A. Well, which count in the bill are you referring to?
Q. Both counts; the two that the jury convicted him on.

Objection by Respondent.

A. Mr. Ford, that is rather a difficult question for me to answer. I can only tell you what I heard said in the Court-room and my impression at the time.
Q. That is what I want you to state.

380 Objection by Respondent.

A. My recollection is that on the first count Mr. Pelley was given a sentence in the penitentiary, but that sentence was suspended upon condition that he pay a fine of a thousand dollars and costs, and that judgment on the second count was suspended.
Q. For how long? A. Five years.
Q. Now, Mr. Jordan, you have had considerable experience both in the State and Federal Courts in matters of that kind where the judgment is suspended. Do you know, legally or otherwise, the purpose of suspending sentence?

Objection by Respondent.

A. I don't believe I can answer that question as broad as that, Mr. Ford.
Q. Well, do you know whether or not suspending a sentence means that at the end of that time, or prior to the end of that time, that the Judge issues a subpoena and notifies the defendant to appear and be sentenced on that suspended sentence before it expires, or whether if he leads a life as contemplated and doesn't violate the law, and there is no evidence of it, that it is just simply suspended for his benefit to make him a better citizen, and unless he violates the terms of that suspension that he is not to appear in Court any more after five years,
381 or not under ban of suspended sentence after five years has expired?

Objection by Respondent.

A. Mr. Ford, at the time that this sentence was pronounced in 1935, the State of North Carolina did not at that time have what is now known as our system of probation.

Q. I understand that. A. We did not have a State probation law; and at that time in my experience in the criminal courts—I have had a great many clients sentenced in similar manner where there would be more than one count in the bill. They would be sentenced on the one count, and the second count, or third, if there were more than two, would be suspended in view of the punishment inflicted on count No. 1. I have had that happen frequently, more often in Federal Court than State Court. I do know the Federal practice now in matters of revocation of probationary sentence because I have appeared in a great many of them, and where a defendant in the Federal Court is sentenced on one count, and on another count is placed on probation for a certain period of time, predicated upon good behaviour that sentence is not, or that condition is not invoked except in conformity with the Federal law, which means that an affidavit must be filed with the Court to the effect that the probationer has violated the terms of his probation, and capias is then issued and he is then apprehended and a hearing is held before the District Judge.

382 Q. Now, I will ask you, Mr. Jordan, if a suspension on the second count—before they had the probation system in North Carolina—if the sentence is given, or fine given, on payment of fine, judgment entered on payment of fine and costs, and judgment suspended for five years or during good behaviour, if that isn't construed, even now, and was at the time, construed as punishment under the first count, and unless the defendant breached the criminal law of the State of North Carolina during that five years, that at the end of five years the Court had lost jurisdiction and couldn't go back and sentence him to the penitentiary, or do away with the suspension of sentence, if he had been a man of good behaviour during that time?

Objection by Respondent.

A. The only way I can answer your question would be to give my legal opinion.

Q. What is the general rule that was followed up to that time and since that time?

Objection by Respondent.

A. Well, it has always been my understanding of the law that when a prayer for judgment was continued for a specified length of time—and my recollection is the State of North Carolina says you can't continue it for a period of more than five years, that when such sentence is imposed, that unless the defendant during the life of
383 that period, violates the terms of it, it expires by its own limitations.

Respondent moves to strick the answer.

A. (Continued) That is my opinion as to the law. I know I have represented a great many defendants in criminal cases where sentences such as that were imposed, and I always advised them that was my understanding of the law, and if they behaved themselves during that period of time, then when it expired, they were free from the Court.

Objection by Respondent and motion to strike.

Q. I ask you if that hasn't been the practice in the Superior Courts here since you have been at the bar—

Objection by Respondent.

Q. (Continued) in the case of suspended sentences?

Objection by Respondent.

A. I would have to answer it this way: my experience in the Criminal Courts of the Nineteenth Judicial District has been that if the defendant, during the period of the suspension of the sentence, or during the period of the continuance of the prayer for judgment, did not violate the terms of the judgment, that it expired with its own limitations.

Respondent moves that the answer be stricken.

A. (Continued) I want to make this statement: I have not examined the Supreme Court decisions of North Carolina on this particular point because I have never
384 had the case to arise before, but I am simply giving what is my opinion of the law. I may be right. I may be wrong.

Q. You never had the matter questioned before?

Objection by Respondent.

A. No, sir; never heard the question raised. My recollection is that I have never read any case in our North Carolina Supreme Court on this particular set of facts. I don't say that there isn't such a case, but I have no recollection of ever reading one.

Q. You do know that Mr. R. R. Williams and Mr. T. J. Harkins appeared in that case as assisting the Solicitor as prosecuting attorneys, don't you? A. Yes, sir.

Cross-Examination

By Mr. Williams

Q. Mr. Jordan, you would not think of putting up your recollection five years ago of the terms of the judgment against the judgment itself, would you? A. Absolutely not. I am only relying on my recollection; and, of course, when the judgment was pronounced against Mr. Pelley and Mr. Summerville, I was not particularly concerned or interested in it, because the jury had acquitted my two defendants, and I simply came down there because we had all been in the case together and I wanted to see the
385 final wind up of it.

Q. Mr. Jordan, just as an illustration of how we will forget, you will be surprised to know that the Judge nonsuited the case against both Kellogg and Hardwick. A. I thought I had to go to the jury. I thought I made a jury speech.

Q. Do you put up your recollection against the record? A. No, sir. If I was successful in getting a nonsuit, I did better than my present recollection.

Q. And when you spoke of judgment having been suspended on the second count, you didn't mean to contradict the record that prayer for judgment was continued on the second count? A. No, sir, my recollection is he was sentenced on the first count and that was suspended upon payment of a thousand dollars and costs, and that he continued prayer for judgment on the second count for five years.

Q. You would not also put up your recollection against the judgment that there were other conditions on the first count in addition to paying a fine and the costs, such as

good behaviour? A. Yes, sir, I recall that one of the conditions on the first count was that Mr. Pelley and Mr. Summerville both should be of good behaviour, and secondly that neither of them in North Carolina should try to sell any stock or print any advertisements soliciting the sale of stock.

386 Q. That was on the first count? A. That was on the first count, yes, sir.

Q. Mr. Pelley and his counsel were in Court at the time? A. Yes, sir.

Q. When judgment was pronounced? A. Yes, sir.

Q. And, of course, you would be governed by the decisions of North Carolina as to the rule of procedure in those cases of suspended sentence and prayer for judgment continued? A. Yes, sir. My understanding is there is a legal distinction between suspension of sentence and continuing of prayer for judgment; that there is a distinction between those two types of sentence.

(Witness examines paper.)

The Court granted a motion for nonsuit as to the defendant Hardwick, and the jury acquitted the defendant Kellogg.

Re-Direct Examination

By Mr. Ford

Q. Mr. Jordan, I will ask you to read this copy of the judgment here and state whether or not this isn't what you stated in your deposition relative to the suspension of the judgment. Judgment was not continued. It was suspended.

Objection by Respondent for the reason that both the statement and the paper are in the record and speak
387 for themselves; and an unidentified paper of some kind is handed to the witness without any evidence as to its correctness or source.

No answer.

J. Y. JORDAN, JR.

388 **Mr. T. J. Harkins**, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Ford

Q. Mr. Harkins, I believe you appeared for the State in the case of State v. W. D. Pelley and others, tried in the Superior Court of Buncombe County at February Term, 1935? A. Yes, sir.

Q. I believe that before we went into trial of the case, you recall that we asked counsel appearing with the Solicitor to disclose the source of their employment, or who employed them to appear in the case, on the ground that the accused had a Constitutional right to know who his prosecutors were? A. I recall that question being raised at some time during the trial.

Q. And you recall that you and Mr. Williams both refused to give the name of your employer other than the State of North Carolina? A. No, I don't recall that.

Q. You do recall that you did not give the information as to who you represented? A. I recall that the matter was brought up in Court and that after some considerable discussion the Court was satisfied and ordered the trial to proceed.

389 Q. I ask if you don't recall that you held up a piece of paper and said that you had authority from the Attorney General, or someone in charge of prosecution of those matters, and that you were appearing under that authority?

Objection by Respondent.

Q. Under the authority of the Attorney General of this State?

Objection by Respondent.

Q. Under the authority of the Commission under that law?

Objection by Respondent.

A. I don't recall any such circumstances, Mr. Ford.

Q. You do recall that you did not furnish us, as we requested, the name or names of the parties who employed you?

Objection by Respondent.

A. I don't recall any such circumstances.

Q. Well, were you employed by the Attorney General of North Carolina, or anyone who had authority connected with the State of North Carolina, to appear as prosecuting attorney in that case?

Objection by Respondent.

A. My recollection, Mr. Ford, is that the Securities Commission or the Corporation Commission of North Carolina requested and authorized the appearance of both Mr. Williams and myself, and that that was done upon the solicitation of the Solicitor of this District.

Q. Now, do you recall, Mr. Harkins, who paid your
390 fees in that matter?

Objection by Respondent.

A. That is a matter that does not concern this hearing whatsoever.

Q. Well, now, of course, that may be questionable, but do you object to answering? A. And I decline to answer because I don't think it is pertinent to the issue in this case.

Q. I don't want to be castigated— A. I don't think it is pertinent to this inquiry or would be helpful to any Court in determining whether or not there is a properly authenticated copy of this record before the Court in Washington upon the habeas corpus hearing. I am willing to answer any question within my knowledge concerning the record of this proceeding. Beyond that, I don't think it is your prerogative or the prerogative of any Court to inquire. I would state, however, that I expect or hope to be present at the trial of this case before the District Judge of the United States Court of the District of Columbia.

Q. You state in your deposition that you don't think any evidence that might be brought out on this line of examination would be of any assistance to the Court hearing the habeas corpus proceeding in rendering a just verdict in this matter because that it might go into something as the
391 starter of this proceeding against Pelley?

Objection by Respondent.

A. I think Mr. Ford, if you ask my opinion as a matter of law, it is within the prerogative of the Court of the District of Columbia in this habeas corpus proceeding to de-

termine these questions: first, whether or not the defendant—that is, the identity of the defendant; whether or not the record before the Court is duly authenticated and appears to be properly certified and authenticated record of the proceedings in the case, and whether or not Mr. Pelley is now a fugitive from justice. Beyond that, I decline to answer.

Petitioner moves that the answer be stricken.

Q. By your declination to answer do you take the position whether it is just or right at all that the justness or rightness of the contention of Pelley in his habeas corpus proceeding ought to be kept from the Court if the knowledge that you have of the questions that may have been asked in this deposition might aid the Court in ascertaining the true facts in the case, in passing upon his right to resist extradition to the State of North Carolina?

Objection by Respondent.

A. I make the same answer, and I may state here that I think that you are exceeding all propriety—

Q. I am not asking you for any condemnation of
392 myself. A. (Continued) Exceeding all propriety in undertaking in this suit, as you did in the former suit, to try to draw across the trail a red herring or to create a bugaboo at which you might strike.

Q. I have never tried to bring out anything except the facts in this case, have I, Mr. Harkins, in any of them? A. I have given my answer.

Q. Then you don't propose to give any further answer relative to your employment in this matter?

Objection by Respondent.

A. I have given you my answer, Mr. Ford. And I may state further in connection with that, that if there was any objection or any exception to anything that transpired in the original trial of Mr. Pelley in the Court, it was in that case and not this case that it should have been raised; that you are undertaking here to collaterally attack a judgment with which Mr. Pelley was entirely satisfied at the time it was rendered.

Q. I never knew any man entirely satisfied to pay a thousand dollar fine and be sentenced to the penitentiary, as you contend, for one or two years. A. I don't contend a thing

in the world about his personal status. I was appointed counsel in this case by Judge Nettles without my knowledge or approval or any intimation whatsoever that I was to be appointed. As a matter of fact, I was out of the
393 city at the time and didn't learn of it until I returned to town.

Q. But you did appear? A. At the present time it is a matter of utter indifference to me and a matter entirely within the breast of the Court whether he discharges Mr. Pelley when Mr. Pelley ultimately gets before him and he calls the case, or whether, in his judgment and discretion and conscience, he thinks Mr. Pelley ought to be punished to a greater extent than he was punished. I have no right to presume upon the conscience, intelligence or purposes or objects of the Court.

Q. Mr. Harkins, before Judge Nettles issued his capias in this matter, did you have anything to do with this present matter?

Objection by Respondent.

A. Not a thing in the world.

Q. Now, Mr. Harkins, of course you accepted the employment after this capias was issued—subpoena capias? A. I have not seen Judge Nettles—

Q. I didn't ask you that. A. What do you mean by "accept employment"?

Q. Accept employment in this case. A. I went along with Mr. Williams, my associate appointed at the same
394 time, in the performance of what I conceived to be my public duty. When a Judge of the Superior Court appoints me to function, then I try to function.

Q. You accepted employment in this case?

Objection by Respondent.

A. I don't know what you mean.

Q. You appeared before the Judge of the District of Columbia? A. Yes, sir.

Q. And you asked for a dismissal, or for extradition to be honored there and the defendant be sent back here? A. That is what I was appointed for.

Q. You accepted service?

Objection by Respondent.

No answer.

Q. Did you know at the time that you were appointed by Judge Nettles that Pelley was going to fight extradition? A. I didn't know a thing in the world about it. I hadn't given the Pelley case one thought since it was tried five years ago, and I was surprised to know that I had been appointed when I found upon my return to Asheville that the Judge had issued a capias and had appointed me.

Q. And of course since the Judge appointed you, you thought it was your duty to the Court and to the public to do what you could in the matter? A. I think you would have felt the same way in the matter.

Q. I think so, too. A. Then why question my con-
395 duct?

Q. I am not questioning your conduct. It is not up to me. I never question anybody's conduct. I just wanted it to go before the Court up there. A. In other words, you wanted the Court to know I had done my duty.

Q. I wanted the Court to know you were employed in the former case and in this one. A. You stated I was employed.

Q. You admit it? A. Certainly. We represented the State in the former matter.

Q. I think the Court is entitled to know. A. How can that affect the validity?

Q. That isn't up to me. A. Mr. Ford, I don't want to argue these questions with you. If you have got any questions to ask me pertinent to this record, I will be glad to answer them. If I don't know the answer or if I think them impertinent or not pertinent to this inquiry, I will decline to answer.

Q. Did you ever consult one George Anderson prior to going into the Pelley case down here?

Objection by Respondent.

Q. In 1935? A. I don't know.

Q. Did you ever consult the lady who came here
396 from Chicago or somewhere up there in the Northwest, voluntarily came here to testify as a witness for Mr. Pelley in that lawsuit down there?

Objection by Respondent.

A. I don't recall.

Q. Do you know whether Mr. Williams ever consulted her or not? A. Not that I know of, and not that I know of did I consult her. You say a witness for Mr. Pelley?

Q. Yes. A. I would not be consulting her.

Q. I ask you again if you don't know that Mr. Williams made a statement to the Court down there that he was going to consult a witness from up there, and when we ascertained who it was we told him she was under subpoena for the defendant and he would consult her at his own peril, and then he had a subpoena issued for her and did consult her? A. I don't know of any such circumstances; and if you are attempting to impute improper—

Q. I am not attempting— A. What is the object of your question?

Q. To bring out the facts. I wanted to show that you didn't put her on the stand. A. Then you are attacking the validity of the original trial?

Q. No, sir, I am not attacking anything. I just want to get what you know about it. Did you represent the
397 plaintiff in a suit for the appointment of a receivership against the Galahad Press?

Objection by Respondent.

Q. And some other concern out there? A. I don't recall. I don't think I did.

Q. I ask you if you don't recall appearing in the Bankruptcy Court—

Objection by Respondent.

Q. After Bankruptcy proceedings were filed? A. It seems to me I have a faint recollection of being in the Bankruptcy Court, but whether I appeared there as counsel, I don't recall.

Q. I ask you if you didn't appear at a number of hearings before George Craig as Referee in Bankruptcy at his office just off the Square? A. I regard it as utterly immaterial, but I can't answer the question.

Q. You don't recall? A. No, sir.

Q. But if the record shows that you did appear as counsel, it speaks the truth ?

Objection by Respondent.

A. Probably so.

Q. Have you ever conferred with Congressman Kramer on the Committee of MacCormick and Dickstein, who examined Pelley and Pelley's employees at the Galahad
398 Press here in 1934—the latter part of 1934?

Objection by Respondent.

A. Mr. Ford, I think that is utterly incompetent and immaterial—

Q. I just asked if you ever appeared? A. If I ever appeared?

Q. Yes: before Mr. Dickstein. You knew when he was here? A. No, I never saw Mr. Dickstein in my life and don't know who he is.

Q. You didn't appear in the case? A. No.

Q. And, of course, Mr. Harkins, you never was employed by the MacCormick-Dickstein Committee as counsel in any of those matters against Pelley, were you—if you never met him? A. No, sir.

Q. Now, Mr. Harkins, do you still refuse to answer the question as to who paid your attorney's fees in the matter wherein Pelley was charged with violation of the Blue Sky laws and was convicted?

Objection by Respondent.

A. I do.

Q. Have you received any compensation in this matter?

Objection by Respondent.

A. Mr. Ford, that is a matter that is beyond all
399 bounds of reason.

Q. Well, that is what you say. A. And it is a matter that you thrashed out to the utmost at the trial of this case, and personally I don't think—

Q. I ask you this question: if you have received any compensation in this present case? I have passed over the other. A. I have answered that question.

Q. I didn't get it. A. I decline to answer it because I don't think it is a proper question for the purpose of these depositions, and, without being too impertinent, I wish to say I don't think it is any of your business.

(Off the record)

Q. Mr. Harkins, have you ever discussed this matter with Mr. Kartus? A. Who is Mr. Kartus?

Q. You know, the young man that was attending the trial of Pelley here, and in the bankruptcy matter. A. Alvin Kartus?

Q. Alvin Kartus. A. The young lawyer?

Q. Yes, sir. A. Mr. Ford, I can't say. Practically every lawyer in Asheville, and there are about two hundred
400 of them, has had something to say about this Pelley case to me at different times, and whether I ever sat down and discussed it with Mr. Kartus or any other person, I can't say. As a matter of fact, I think it is not pertinent to the issue.

Q. That is perfectly all right. A. Well, I decline to answer further than I have answered it.

Q. I respect your opinion about it, but I want to get it in the record. A. I decline to answer further than I have answered it.

Q. State whether or not you know of your own knowledge that Mr. Kartus has taken a great deal of interest in this matter, not only of the trial of the bankruptcy matter, and the trial of Pelley down there, and Summerville and Kellogg and Hardwick, and also in having issued a subpoena and order directing the Sheriff of Bucombe County to go out there and seize all records, etc. of the Liberation?

Objection by Respondent.

A. Mr. Ford, I know absolutely nothing about it. I wasn't here when that happened and have never seen any of the records, myself, and know absolutely nothing about it.

Q. Well, of course, you didn't examine any of those records while they were in the Sheriff's possession? A. No.

Cross-Examination by Mr. Williams

401 Q. Mr. Harkins, was Mr. Pelley in Court at the time that the judgment contained in the authenticated record was rendered? A. Mr. Pelley was present with his counsel, Mr. Joseph Ford and Honorable R. H. McNeil, of Washington, I believe.

Q. Mr. Harkins, state whether or not there was any objection made by Mr. Pelley to that judgment at the time?

Mr. Ford: We ask Mr. Harkins only to stand on the record, as he has required us to do.

Mr. Harkins: In the light of that statement: you have asked me no questions at all about the record in this case.

Mr. Ford: You said you were standing on the record.

Mr. Harkins: Every question you have asked me has been extraneous to the record and extraneous to the issue in this case.

Mr. Ford: And you rely on the record?

Mr. Harkins: My answers are in the deposition.

Mr. Ford: Now, I have no objection except what is fair for one is fair for the other.

Mr. Harkins: I think it is utterly immaterial to this hearing, but I will state that both Mr. Pelley and his counsel seemed very greatly pleased and satisfied with the disposition the Court made of the case.

Petitioner moves to strike the answer.

402 Mr. Ford: It is not a question of what it "seemed." If he says "very well pleased," that would be all right, but I don't want it to go in there that it "seemed." If he puts in there that we were very well pleased with it, that is perfectly all right. Just cut the word "seemed" out. Otherwise, I move to strike it out.

Mr. Anderson: I move to strike out the answer as calling for a conclusion of the witness.

Respondent consents to the striking out of the answer because it is immaterial: the question and answer.

THOS J HARKINS

403 **Judge Robert M. Wells**, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Ford

Q. Your name is Judge Robert M. Wells? A. Robert M. Wells is my name.

Q. Mr. Wells, you were a practicing lawyer, I believe, in 1935 here in Asheville? A. I was.

Q. You were one of counsel for W. D. Pelley— A. I was.

Q. And Robert Summerville in the trial of that case? A. That is correct.

Q. Do you recall the circumstances under which trial was carried on and before whom it was tried? A. My recollec-

tion, Judge Warlick was the presiding Judge holding Court in this District.

Q. Do you recall the names of the attorneys who represented the State, or prosecution, in that matter? A. That was Judge Nettles, who was then Solicitor, and Captain Williams and Mr. Harkins, I think.

Q. Now, Mr. Wells, do you recall when Judge Nettles' term as Solicitor expired? A. I think Zeb resigned as Solicitor the last of November, 1938. I think that is
404 right.

Q. He was elected Judge of the Nineteenth Judicial District at the election in November, 1938, was he not? A. I think that is correct.

Q. And I believe you were elected Solicitor of the Nineteenth Judicial District at the same election? A. That is true. When Mr. Nettles resigned he lacked about thirty days, I think, of his term expiring, and he resigned and the Governor appointed me for the unexpired portion of Mr. Nettles' term.

Q. Judge, do you recall any conversation that you and Mr. McNeil had with Judge Warlick before the judgment was signed and sentence was passed by him on Mr. Pelley and Mr. Summerville at the conclusion of that trial?

Objection by Respondent as incompetent and immaterial.

A. I have some recollection of a conversation with Judge Warlick, the details of which I don't know whether I can give very accurately or not.

Q. You do recall that he was convicted on two counts, one count, I believe, for publishing notice of the sale of stock of a corporation, and another count of offering for sale?

Objection by Respondent.

A. That is my recollection of the verdict.

405 Objection by Respondent and motion to strike the answer for the reason that the record itself speaks for the facts in the case.

Q. Judge, how long have you been practicing law? A. A little over forty years.

Q. What legal positions have you held during that time? I mean public positions as prosecutor, Judge or otherwise. A. Back yonder when I was a boy I filled the unexpired term

of a man by the name of Ferguson in this Judicial District as Solicitor, and following that I filled the unexpired term of Congressman Gudger when he went to Congress from this District. I don't remember the months. Perhaps the last was about two years. Do you want me to tell all the little details?

Q. No— A. Since that time—after that, I was elected County and Juvenile Judge in this County and in the City of Asheville. I think it was six years I held. Then following that I was elected Solicitor of this District and held that position, I think, four years. Following that I was elected to the Mayor's office in the City of Asheville, two terms; and, just as I said a while ago, I was elected then Solicitor of this District for four years, in November, 1938, I reckon it was.

406 Q. I believe you served a term or two terms as Judge of the Police Court in the City of Asheville? A. That was the thing I referred to a while ago; the Police Court and the County Juvenile Court were then combined.

Q. Six years? A. Six years, I think it was.

Q. During the time you served as Solicitor and Judge, state whether or not you had much experience in suspending judgments?

Objection by Respondent as immaterial and incompetent.

A. I don't know whether you would call it experience or not, but I did a lot of that.

Q. Well, Judge, are you familiar with the practice in North Carolina with respect to suspended judgments, and do you know of your own knowledge where a judgment is suspended for a term of years that, on good behavior, that that is considered by the profession and by the Judges as being automatically—the suspension automatically ceases unless the defendant breaches some condition of the judgment or is charged and convicted of a criminal offense after the suspension of the judgment, before he is called in to answer or to be sentenced under the original suspended judgment?

407 Objection by Respondent for the reason that it is incompetent and immaterial and for the further reason that it calls for an opinion as to what the law is.

A. I have always understood, or it is the custom, rather, that if a judgment is suspended upon conditions of good behavior, that it followed that the parolee had to breach the terms of the judgment, suspended judgment, and he would not be called back to answer any charge, or discharge, unless he breached some of the terms of it. I think that is what I would regard as the law and the custom. However, there is a difference; our State has been holding here lately from the Attorney General's office that if a man violates the terms of his good behavior and he is out on suspended sentence, that upon motion of the Attorney General of North Carolina, or the Solicitor of the District in which the defendant was convicted, the capias would issue and the sentence put into effect. I don't think that is so all the time; but I think that covers most of the instances of which I have any knowledge.

Respondent moves that the answer be stricken.

Q. I will ask you, Judge, if it isn't a fact that that is a condition that exists today under the authority of the Parole Commissioner that was passed in 1937, which gives the Courts a right with respect to a person who is under parole, and does not apply to those cases in which the
408 original judgment is suspended upon the payment of cost, or fine and cost, and during good behaviour for a number of years, not exceeding five?

Objection by Respondent for the reason that it is leading, incompetent and immaterial.

A. As I understand the present rule, a parolee, upon a report of the parole officer that the parolee has violated the terms and conditions of the judgment, the parole officer will report that to the Court of the jurisdiction where the sentence originated, and upon that, why the Judge makes the order for him to come in and receive the judgment of the Court for violation of the parole.

Motion by Respondent to strike the answer.

Q. That is, to come in and to receive— A. Punishment and receive the judgment of the Court.

Q. If it is found by the Judge that he has breached the parole?

Objection by Respondent.

A. It don't go quite that far, I think. My understanding and observation here—we have lots of them pending—if the parole officer comes in and makes a report, when that is verified, the Court calls upon the parole officer in charge of the defendant and verifies that he has violated the terms of it, and the Judge then makes the order for him to come in and receive the judgment of the Court.

Motion by Respondent to strike the answer.

409 Q. Now, that parole statute was not passed until 1937, was it? A. That is my recollection of it.

Q. It was not in effect at the time of the filing of any of the judgments against Mr. Pelley in 1935? A. I think that is right.

Q. Now, Mr. Wells, in October, 1939, you were Solicitor of this District, were you not? A. I was.

Q. Did you request Judge Nettles, or inform Judge Nettles that there had been a breach of the terms of the judgment upon the part of Pelly, that was entered by Judge Warlick in February, 1935?

Objection by Respondent as incompetent and immaterial.

A. No.

Q. Do you know of anyone who did inform Judge Nettles?

Objection by Respondent.

A. I never heard of it until I heard the order dictated from the Judge on the bench.

Q. I will ask you if at the time Judge Nettles dictated the Order that he read a prepared statement from the bench with respect to his reasons for issuing the order directing that a capias issue for Pelley?

Objection by Respondent.

A. He read a statement preceding, as I recall now,
410 the order, and perhaps enumerated the things in this statement that he regarded as a violation of the parole.

Motion by Respondent to strike.

Q. I will ask you to read this paper writing and state whether or not it refreshes your recollection as to what Judge Nettles—what statement Judge Nettles made on the bench prior to issuing the order directing a subpoena to issue against Pelley. (Hands witness paper.)

Objection by Respondent as immaterial and incompetent.

A. Of course, your recollection doesn't serve you for the exact language. My recollection, that is about in substance what the Judge said at that time; and it was read, of course, from the bench at the time; and, my recollection, preceding the ordering of the capias.

Motion by Respondent to strike the answer.

A. (Continued) I will modify that by saying substantially so; indicated by the quotation marks. The other part added to it at the last is no part of it, of course; just the part quoted.

Q. Judge Wells, you dictate to the reporter what that printed part of that paper is that you identified as the statement—substantially the statement—made by Judge Nettles from the bench just before the time he ordered capias against Pelley to be issued.

411 Objection by Respondent.

A. The paper which I hold in my hand entitled "Text of Statement," beginning near the top at the point in quotations, "At the February Term, 1935," and ending at the quotations at the bottom of the page of the article, "I would not want to embarrass you at all in this matter on account of your connection with the case. I will request Mr. R. R. Williams and Thomas J. Harkins to present the matter whenever he is brought before the Court." That is the end of the quotation.

Respondent moves that the answer be stricken.

The petitioner offers in evidence statement identified by the witness Judge Wells and asks that it be marked "Exhibit E" and attached to his deposition.

Objection by Respondent for the reason that the paper in question appears to be a clipping from some newspaper, and for the reason that it has not been properly identified, and for the still further reason that such statement does not appear as a part of the record in the Pelley case.

Q. Judge Wells, I don't know whether I asked you whether or not you requested the Judge to enter an order issuing a capias for Mr. Pelley?

412 Objection by Respondent.

A. I did not.

Respondent moves that the answer be stricken.

Cross-Examination

By Mr. Harkins

Q. Mr. Wells, you were Mr. Pelley's attorney at the time he was tried originally—one of his attorneys? A. One of his attorneys.

Q. And in 1938 you were elected Solicitor of this District? A. Yes, sir.

Q. It became your duty then to prosecute all criminal cases? A. Yes, sir.

Q. Mr. Wells, have you read the North Carolina cases upon which the question of the right of the Court to suspend sentence and to continue prayer for judgment and subsequently to bring the defendant in upon motion of the Court or any of the parties involved.

Petitioner objects.

A. I have read such of the decisions as have been called to my attention or that I could find, I think.

Mr. Anderson: He couldn't possibly know whether he had read them all or not.

Mr. Harkins:

Q. It is the common practice and custom for the Court to suspend sentence upon payment of fine or costs in
413 the case, and upon certain conditions of good behaviour, is it not? A. I think that is kind of the prevailing custom in this part of the country.

Q. And it is also the custom of the Court, and you have often seen it happen, for the Court to continue prayer for judgment in a case? A. Many times, yes, sir.

Re-Direct Examination

By Mr. Ford

Q. Judge, is it customary for the Judge of the Superior Court or Judge of any Court of competent jurisdiction ex moro motu—of his own motion—in suspending a sentence, or continuing prayer for judgment, of his own motion to bring into Court, or order to issue a subpoena against a defendant just before his time on a suspension of judgment expires, without some evidence or some personal knowledge of the Judge that he has breached the terms or conditions of the suspended judgment, or the conditions upon which the prayer for judgment was continued?

Objection by Respondent.

A. So far as custom goes, I think perhaps each of the twenty-one Judicial Districts of North Carolina have their own customs, and perhaps the Judges in different parts of the State. I don't think any of them have established any particular rule. My observation has been that
414 if a Judge has reliable information that a suspended judgment, the defendant has breached it, he may call the attention of the Solicitor to it, and he may sometimes issue a capias or citation to appear and show cause why he should not be adjudged—why he should not strike out the prayer for judgment continued or the parolment. I don't know that you can say there is any particular custom, because I really believe Mr. Swain's statement made to you, I think perhaps that covers the whole ground.

Respondent moves that the answer be stricken.

Q. Is it the practice in the Criminal Courts that you have practiced in for a Judge to bring a defendant, where in a former matter he has continued a prayer for judgment, bring him into Court by an order directing a capias to issue for his arrest, without some evidence or personal knowledge brought to the Court's attention by the Solicitor or by affidavit, or by his own knowledge independent of the affi-

davit or the Solicitor's motion, to show cause why judgment should not be entered in the matter?

Objection by Respondent.

Q. Is it the procedure or practice for the Court to do that —for the Judge to do that—in courts that you have practiced it?

Objection by Respondent.

A. I don't remember any instance of that. I was
415 thinking a moment ago, that, as I recall it now, a case went up from Swain County where Judge Moore ordered the defendant, who had apparently breached the conditions of the judgment, to be brought into Court and sentenced, and I think that is the only instance that I can recall of, that I have seen in the books. Went to the Supreme Court, is my recollection.

Respondent moves that the answer be stricken.

R. M. WELLS

416 *Pelley Exhibit E*

Text of Statement

The prepared statement read by Judge Nettles at the time he ordered the capias issued for Pelley is as follows:

"At the February term, 1935, W. D. Pelley was convicted in this court for two distinct felonies, one for violating the Blue Sky laws, and the other for a crime involving high moral turpitude, namely, that of making fraudulent representations. At that time information came to the attention of the court that Pelley was collecting sums of money from credulous people by playing upon their religious, racial and social prejudices and fears. It was suggested even at that time that he was being paid for his propaganda by sinister foreign sources. He pleaded for mercy and promised to lead a decent life.

"Pelley was sentenced for one to two years in the state's prison on one of these convictions, but on account of these assurances, Judge (Wilson) Warlick, a humane and just judge, suspended the prison sentence for five years upon payment of a fine of $1,000 and costs and upon condition

that the defendant 'be and remain continuously on good behavior.'

"On the conviction for fraudulent representations, prayer for judgment was continued for five years.

"Deserves Condemnation"

"Since these convictions, this court has been informed Pelley has not only broken the promises which he made to the court, but has engaged in practices and propaganda which deserve the severe condemnation of all good American citizens. He has continued to prey upon and collect money from credulous neurotic people to his own enrichment by appealing to their basest religious, moral, racial and social prejudices. He has attempted to reap financial profit by engaging in every possible form of un-American activities. He has leveled disgusting epithets against the office of the President of the United States. He has consorted with known enemies of American institutions. There are many reasons to believe that he is being paid from foreign and un-American sources. He is now said to be conducting his nefarious practices from some secret hiding place; made afraid by his knowledge of his own wicked misdeeds, to face in public his fellow American citizens.

"Enjoys Laws' Protection"

"Here is a man enjoying the protecting of our laws. He has deliberately violated our laws against crime. He is a felon. Such conduct on his part would in the country he professes to ape, admire, love and respect, forfeit his life. He deals in accusations, loud boastings, preens his feathers like a peacock and struts upon the stage of life, falsifying facts and hurling accusations. In his desperation to gain attention and occupy the spotlight, he has even accused our great President of high crimes and misdemeanors. He professes to be a friend of the American people and at the same time advocates class, racial and religious hatred.

"It is not those, Mr. Solicitor, from without that we must watch, but those so-called saviours of mankind who are preaching a doctrine deadly to American institutions. This defendant who has been moving in our midst seeking to further the cause of Naziism with himself as the dictator, seeking to destroy justice and liberty and abolish all laws, living

under the very protection of that law, he is seeking to overthrow and trying to undermine our system of government. Such a man cannot deserve the blessings of a government like ours. He is a menace to our society. Gratitude is one of the most beautiful attributes of human character. This man 'smites' the hand that feeds him and has the unenviable record and distinction of being a contemptible ingrate.

"Helped Unravel Course"

"We do not have to defend our system of government from a character or individual. For three weeks I sat here in this very courtroom and helped unravel a course of crooked dealing, thievery and stealing sufficient to damn any man, much less this contemptible seeker after notoriety, W. D. Pelley, so-called and self-styled leader of the Silver Shirts, convicted felon, not now even a citizen of our country. A Buncombe county jury says he is not, yet he would be our dictator and would tell our country what to do.

"We have diffused in this great land of ours well-being among the whole population to an extent without parallel in any other country in the world. We have furthered peace-keeping, peace-loving, among our peoples; we have set a splendid example of the broadest religious toleration and freedom, and we have welcomed newcomers from all parts of the earth and have proved that they are fit for political freedom. These are some of the practical things we have accomplished in this great nation of ours. They are the triumphs of reason, enterprise, courage, faith and justice over passion, selfishness, inertness, timidity and distrust.

"Man's Work To Do"

"In these days of trouble and of daily national emergencies, there is a great comfort in the thought and recollection of Washington, Jefferson, Jackson, Lincoln, Wilson and hundreds of other great Americans who gave their lives that our country might live. The zeal of justice, of learning and humanity lies deep in the American heart. Whenever a man tries to tear down the institutions of this great democracy by boring from within, Mr. Solicitor, then I say that we should be on our guard and get to work. It is well to be a gentleman and a scholar, but after all it is better to be a man ready to do a man's work and face the practical things of life.

"We have a man's work to do in making democracy work here in this nation of ours; to preserve its institutions, its freedom, its Christianity, is men's work. We must preserve and obey our laws. We must enforce our laws. We must be tolerant. We must be religious. We must do our utmost to carry on where our fathers and mothers left off in order to hand down to our children a better citizenship, but eternal vigilance is the price of liberty.

"Owes Debt To Society"

"W. D. Pelley has set up in our midst a printing press and is sending out to the country at large messages devoted to bigotry, class and racial hatred, religious tolerance, with the end in view of overthrowing our government. He owes a debt to society, Mr. Solicitor, for his criminal conduct, having been heretofore convicted of two felonies in this country.

"I direct you, Mr. Clerk, to issue a capias for the arrest of this man and have him brought before this court, Mr. Sheriff, to be dealt with under the law and justice. Mr. Sheriff, I hope that you will make every effort to apprehend this man and bring him before this court in order that he may make a bond in the sum of $10,000 for his appearance before Judge (J. A.) Rousseau at the November term of this court.

"Mr. Solicitor, I would not want to embarras you at all in this matter and on account of your connection with the case, I will request Mr. R. R. Williams and Thomas J. Harkins to present the matter whenever he is brought before the court."

Judge Nettles expressed the opinion that any action of the court would be based on the second count, in which prayer for judgment was continued for five years. He said he regarded the other count as finally disposed of with the payment of the fine and costs.

417 Mr. Ford: Miss Shank, I want you to take this portion of this letter from Mr. Pelley, releasing me —waiving his right for me to insist upon my confidential communications with him:

"Attorney Joseph Ford, Asheville, N. C." Dated Washington, D. C., March 23, 1940. "You will please consider this letter as your release from me of counsel immunity as

between attorney and client in suggested taking of depositions on Tuesday, the 26th, in the Pelley case hearing desired by Mr. O'Connell. As I do not know the exact legal forms for describing this immunity, I trust the foregoing expression from me will suffice."

Mr. Joseph F. Ford, a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Anderson

Q. You are a member of the Bar in Asheville? A. Yes, sir.

Q. How long have you been practicing law? A. Since September, 1905.

Q. Refreshing your memory to February of 1935, were you one of the attorneys who represented Mr. W. D.
418 Pelley in a criminal action against him? A. Yes, sir, I was attorney for Mr. Pelley and Mr. Summerville in that criminal case; heard by Judge Wilson Warlick.

Q. Were you present in Court at the time Judge Warlick made an order regarding Mr. Pelley's sentence? A. I was.

Q. Were you present at any discussions regarding that order prior to its issuance? A. I was not present at any of the discussions. Mr. Pelley, as I recall—or the jury came in about nine or ten o'clock in the evening after they took the case, and I was not present when the jury came in with the verdict.

Objection by Respondent.

A. (Continued) And the next morning when I went to the Courthouse Mr. McNeil—Robert H. McNeil, who appeared in the case for Pelley and Summerville—was in Judge Warlick's private office, and as I went in the Courtroom, or as I was in the hall, Mr. Robert R. Williams was coming out of Judge Warlick's office. Afterwards, Mr. McNeil came into the Courtroom—

Q. Is that Mr. Williams— A. Mr. Robert R. Williams.

Q. Representing the State? A. Yes, sir. What the discussion was between Judge Warlick, Mr. McNeil and
419 Mr. Williams I didn't hear, but Mr. McNeil came back in the Courtroom, talked with Judge Wells and

myself and Mr. Pelley and Mr. Summerville, and told us the result of his discussion with Judge Warlick with respect to his judgment in the matter.

Q. Discussion with him as co-counsel? A. Yes, sir. He told us that Judge Warlick—

Objection by Respondent.

A. (Continued) would be willing to enter a fine and the costs against Mr. Pelley and Summerville of a thousand dollars,—I believe it was a thousand, first, for Pelley and $250 for Mr. Summerville, and the costs of the action. Mr. Summerville had no money to pay any cost or fine, and we, as I recall now, asked Mr. McNeil to consult further with Judge Warlick and apprise him of the fact that Mr. Summerville had no money to pay any cost at all, but that Mr. Pelley would pay the cost and a fine of a thousand dollars, and my recollection is that that was acceptable, and the fine, as I recall now—of course, that is subject to the judgment —as I recall, they fined Pelley a thousand dollars and the costs, which amounted to between seventeen and eighteen hundred dollars.

Respondent Moves that the answer be stricken as incompetent and immaterial.

Q. Was that suggestion of disposition of the case made by Judge Warlick or by one of the counsel, or do you
420 know? A. I don't know who it was made by, except what Mr. McNeil told us.

Objection by Respondent.

A. (Continued) I don't know at whose instance it was made, but I do know that we told Mr. McNeil that Summerville had no money at all and couldn't pay any fine, and it simply meant that somebody would have to pay it for him or he would have to take his medicine.

Q. Did you, as one of the counsel for Mr. Pelley at that time feel then that you understood the terms of sentence?

Objection by Respondent.

A. I did.

Q. And what was your understanding of the terms?

Objection by Respondent for the reason that the record speaks for itself.

A. There is one matter I specifically remember aside from the penalty or the fine and the cost, and that was that Judge Warlick had written in the original judgment that as one of the conditions that Mr. Pelley should not publish any paper or magazine in the State of North Carolina for a period of five years, and I personally talked to Judge Warlick myself and told him that that was a violation of Mr. Pelley's Constitutional rights, and he readily agreed with me and struck that out, and I think—I am not sure, but I think—the original judgment will show where he
421 marked that out with a pen and wrote with that pen certain phrases there, that he would not publish any magazine or paper carrying an advertisement of the sale of stock without getting a license from the Commission, registering said stock.

Respondent Moves that the answer be stricken.

Q. Was it your understanding that if he kept the terms in that order, or sentence, that he would be automatically dismissed at the end of five years?

Objection by Respondent.

A. That was my understanding; and I will state further that that has been my experience of the practice in the Criminal Courts of North Carolina, and also in the Federal Courts; and if the defendant keeps the terms and doesn't disobey the terms of the continuance or prayer for judgment or suspended sentence during the time specified in the judgment, that at the end of that time he is automatically discharged and cannot be brought back into Court,—

Respondent Moves to strike the answer.

A. (Continued) until he was charged with breach of that suspension or continuation of the prayer for judgment by the commission of some crime or the commission of some conduct—being guilty of some conduct—that would be construed a breach of the terms of that contract; and that, to my knowledge, has been so as long as I have been practicing. My practice has not been very extensive in the
422 Criminal Courts, but that has been my understanding of the practice in North Carolina ever since I have been practicing law.

Respondent Moves to strike the answer.

Q. As an attorney of many years' practice before this Court, what is your understanding of the term "good behavior" in connection with a sentence in North Carolina?

Objection by Respondent.

A. My understanding of "good behavior," which is a general term, it doesn't apply to good behavior as would apply to good behavior of a gentleman, or member of the Church, or something of that kind, but it applies to the charge and conviction of a crime against the State or against the publiy or where a man commits a perjury; goes to a man's standing or personality.

Respondent Moves that the answer be stricken.

Q. You would not consider that a man in exercising freedom of the press, publishing certain pamphlets or other publications that offend certain persons, would necessarily be guilty of bad behavior?

Objection by Respondent.

A. No, sir. I consider a man has the right to free speech, under our Constitution and under our form of Government, as I understand it, unless he violated the law by reason of giving out a confidence or printing libel or something against some individual.

423 Respondent Moves that the answer be stricken.

Q. Was anything mentioned at the time that sentence was pronounced, as between bench and counsel for either side, or the defendant, that Mr. Pelley was securing release from coune one of the verdict, only, and at the end of five years stood to be sentenced on count two?

Objection by Respondent.

A. No, sir, there wasn't anything said about that, and we had no idea that that was the condition. If I had, we would not have consented but would have taken our chances with the Supreme Court of North Carolina.

Respondent Moves that the answer be stricken.

Q. It was, then, because Mr. Pelley considered that both counts were being disposed of that we waived our rights to appeal.

Objection by Respondent to what Mr. Pelley considered. A. What I can state about that is that Mr. McNeil, in our presence—in my presence, and, as I recall, in Judge Wells' presence, stated to Mr. Pelley that so long as he didn't violate the laws of the State of North Carolina, or the laws of—any laws, as to that—that at the end of five years that there would be no charge against him and nothing further done about it; simply die of its own volition—automatically.

Respondent Moves that the answer be stricken.

424 A. (Continued.) That is my collection; because my recollection is that Mr. Pelley asked if that would not be.

Objection by Respondent and motion to strike.

Q. If you had known that Mr. Pelley was to be brought in at the end of five years and probably sent to the penitentiary, would you, as one of his counsel, have advised him to take that sentence?

Objection by Respondent for that it is incompetent and immaterial, and the further reason that it doesn't appear that there is any probability of any particular judgment being pronounced on Mr. Pelley, a matter entirely within the bosom of the Court.

A. I would not.

Respondent Moves to strike the answer.

Q. Mr. Ford, did Prosecutor Nettles raise the slightest objection to the verdict delaying sentence on count two for five years?

Objection by Respondent.

A. No, sir; not in my presence.

Respondent Moves to strike the answer.

Q. Did he make any mention of dates of sentence in the two counts at the time sentence was uttered?

Objection by Respondent.

A. Mr. Nettles?

425 Q. That is right. A. No, sir; not that I recall.

Q. Did the Judge?

Objection by Respondent.

A. Not that I recall.

Q. You can swear that it was the belief of Mr. Pelley's counsel at the time that that verdict was taken as a whole, can you not?

Objection by Respondent.

A. That was my understanding. Now, I can't state what was said, but I do know, or I have a recollection that Mr. Pelley discussed the matter with Mr. McNeil in the Courtroom after Mr. McNeil had talked to Judge Warlick, and, as I recall, Mr. Pelley asked him whether or not that would do away with all of it, and Mr. McNeil told him, "So long as you carry out the terms of this judgment and are not convicted, or charged or convicted of any crime in North Carolina, and don't breach any of the other conditions of the judgment," he said, "at the end of five years why it automatically passes out."

Objection by Respondent and motion to strike.

Q. It was not understood by you that at the end of four years and eight months that a capias would issue for his arrest on that sentence?

Objection by Respondent.

426 A. It was not understand by me that a capias would ever issue unless he had in some way breached the conditions of the judgment.

Respondent Moves to strike the answer.

A. (Continued) I want to state further, in support of my statement as to my understanding as to continuing prayer for judgment, or suspension of judgment, that I frequently, both in the Federal and State Courts here—

Objection by Respondent to this statement.

A. (Continued) I have frequently heard the Judges lecture defendants and tell them that so long as they did not

breach the terms of the judgment until the term the prayer for judgment was continued, that they would not have to come back to Court, but as soon as a breach occurred, they could be brought into Court for sentence on the original charge; and they adjured them not to breach the terms of the judgment and to live a better life and make a better person.

Respondent Moves to strike the answer for the reason that it is voluntary and incompetent and immaterial.

Q. If that judgment does mean that he can be brought in after five years and sentenced on count two, it was misconstrued by you as one of his counsel at the time?

Objection by Respondent.

A. It was.

Objection by Respondent.

A. It was.

Respondent Moves to strike the answer.

Cross-Examination

By Mr. Harkins

Q. You say you have read the original judgment in this case? A. Yes, sir, I have read it.

Q. You don't have any reason for controverting the copy, that certified copy of the judgment that is authenticated as part of the record in this case? A. I don't know anything about the copy; not a thing in the world.

Q. You have read the papers in this case? A. I have—no, not this case. I haven't read the petition. I don't know what is set forth in the petition.

Q. You read the original judgment at the time it was rendered? A. Yes, sir, and called Judge Warlick's attention to that particular part.

Q. And you and your client and your associate counsel were in Court at the time the judgment was entered? A. My client and I were there and, as I recall, Judge Wells was there and Mr. McNeil was there, but I am not testifying as to that, but that is my best recollection. I was there when the judgment was prepared and brought into Court and we were given—I was given—a copy of it to look over,

428 and I noticed this error that Judge Warlick had inadvertently fallen into.

Q. I ask you if you and your client, Pelley, were in Court at the time judgment was pronounced from the bench? A. At the time judgment was signed, yes, sir.

Re-Direct Examination

By Mr. Anderson

Q. As a matter of fact, Judge Warlick dictated it from the bench? A. I don't know whether he did or not, or whether from his office.

Q. He read it from the bench? A. He signed it. I don't know that he read it. When I called his attention to that inadvertence, he rubbed out, or marked out, that clause that we objected to and wrote in in his own handwriting—that is my recollection—wrote in in his own handwriting a correct statement of that condition.

Q. How many lawyers did Mr. Pelley have at the time? A. Judge Wells and myself and Mr. R. H. McNeil.

Q. Would it not have been unlikely that all of those lawyers would have been mistaken as to the terms of sentence?

Objection by Respondent.

A. I think Judge Wells and Mr. McNeil both would remember in a general way what the judgment was. I don't know that they could remember them verbatim. I can't do that.

Objection by Respondent and motion to strike.

A. (Continued) I think they would remember the
429 purport of the judgment, or the substance of it—material parts of it.

Q. You would have been apt to know at the time more about its contents than you do now?

Objection by Respondent.

A. Yes, I think I would. At that time I was there in the Courtroom.

Respondent Moves to strike the answer.

Q. You felt you understood the terms?

Objection by Respondent.

A. I thought I did, yes, sir.

Respondent Moves to strike the answer.

JOSEPH F FORD.

The Respondent Now Moves to strike all portions of the testimony of Mr. Ford and other witnesses in this case and does not pertain to the question of the correctness of the authenticated record in this case, to the identity of W. D. Pelley, or to the question of whether or not he is a fugitive from justice. The Respondent moves, also, that all exhibits be stricken.

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430 STATE OF NORTH CAROLINA,
County of Buncombe.

I, Marie Shank, Notary Public in and for the County of Buncombe, State of North Carolina, functioning as such by virtue of my appointment to that office by Hon. Clyde R. Hoey, Governor of North Carolina, do hereby certify that the foregoing depositions were duly taken before me at the place and time therein mentioned, and were reduced to writing by me; that I am not of counsel to nor by blood related to any of the parties to the said litigation and am not interested in the outcome thereof.

I do further certify that the witness Judge Zeb V. Nettles is a Judge of the Superior Court of North Carolina and that immediately after giving his deposition he went to Winston-Salem, North Carolina, for the purpose of holding Court and that he cannot be reached to sign his deposition; that I have signed the same, and that it is a true, correct and accurate transcript of the deposition as given by him.

MARIE SHANK
(Seal) *Notary Public Buncombe County, N. C.*

My Commission expires September 28, 1940.

431 Endorsed: Filed Mar 29 1940 Charles E. Stewart, Clerk

In the District Court of the United States
for the District of Columbia.

Wednesday, March 27, 1940.

Habeas Corpus No. 2067.

In re: WILLIAM D. PELLEY, *Petitioner.*

Transcript of Proceedings
Volume 1

Copy for the Court.

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432 *Contents*

Wednesday, March 27, 1940.

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433 Endorsed: Filed Mar 29 1940 Charles E. Stewart, Clerk

In the District Court of the United States
for the District of Columbia

Habeas Corpus No. 2067.

In re WILLIAM D. PELLEY, *Petitioner.*

Washington, D. C.,
Wednesday, March 27, 1940.

Deposition of Robert H. McNeill, a witness of lawful age, taken on behalf of the petitioner in the above-entitled cause, wherein William D. Pelley is the petitioner, pending in the District Court of the United States for the District of Columbia, pursuant to notice, before Lloyd L. Harkins, a notary public in and for the District of Columbia, at the office of T. Edward O'Connell, 424 Fifth Street, Northwest, Washington, D. C., at 2 o'clock p. m., on Wednesday, March 27, 1940.

Appearances:
On behalf of the petitioner:
T. Edward O'Connell.
Franklin V. Anderson.
On behalf of the United States of America:
John J. Wilson, Assistant United States Attorney.
John C. Conliff, Assistant United States Attorney.

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434 **Robert H. McNeill**, a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct Examination

By Mr. O'Connell:

Q. What is your full name? A. Robert H. McNeill—M-c-N-e-i-l-l.

Q. You are a practicing lawyer here in the District of Columbia, are you not? A. I am.

Q. How long have you been practicing in the District of Columbia? A. About 36 years in the District of Columbia; six years previous thereto in North Carolina.

Q. How long have you been a member of the bar of the State of North Carolina? A. Forty-two years.

Q. In the course of your practice have you become very familiar with the laws of the State of North Carolina? A. Generally familiar. Of course, in the last 36 years I have not been familiar in detail, as I was prior to that.

Q. Do you know William D. Pelley? A. I do.

Q. Can you tell us when you first knew him? A. My recollection is that I met him in the fall of 1934, first, in the District of Columbia.

Q. Did you represent him in Asheville, Buncombe
435 County, North Carolina, when he was tried on a charge of violating the blue-sky laws of the State of North Carolina? A. I did together with Robert M. Wells and Joseph Ford, of the Asheville bar.

Q. Do you recall his being convicted on two counts? A. I do. I couldn't recall with certainty which counts in the indictment those were without checking the records, which I have not had an opportunity to do. There were 16 counts in the indictment.

Q. But you do recall very definitely that he was convicted on but two counts? A. I do.

Q. Do you recall what disposition the Court made in imposing sentence? A. Speaking from memory and not from any records, my memory is that on one of the counts, the first one in order in the indictment, he was found guilty and fined a thousand dollars and the cost of the action, which aggregated about $800, and that on the other count on which he was convicted there was a suspended sentence.

Q. Do you recall what the suspended sentence was? A. Suspended for five years during good behavior.

Q. Do you know what the sentence was which was suspended? A. The sentence in which he was fined, according to my recollection, carried with it a one-year term in the state prison, at hard labor. That prison sentence was suspended on condition that he pay the fine and the costs.

On the other count which he was convicted on, according to my recollection, the sentence was altogether sus-
436 pended during the five years, during which time he was to be on good behavior.

Q. Did the Court indicate any length of time that would be imposed should he violate the good-behavior provision? A. Speaking again very definitely from my memory and not from any records, the Court did not impose any condition beyond the five-year limitation as to good behavior.

Q. Did you have a conference with Judge Warlick prior to Pelley's being sentenced? A. I did.

Q. Do you recall whether or not you came to an agreement with him as to what sentence should be imposed? A. Well, he agreed with us. Of course, we could not, as lawyers, agree with him, but we had an understanding with him; that is, he stated what was in his mind as to what he intended to do.

Q. What was that? A. He stated his purpose to be to require the payment of a thousand-dollar fine and all costs, that he would then put the defendant under good behavior for five years, and that that would be the end of it if he maintained good behavior during that period of time.

By Mr. Wilson:

Q. Are you still speaking from memory? A. Yes.

By Mr. O'Connell:

Q. It was understood that the suspension of sentence was conditioned on the payment of $1,000 and costs?

Mr. Wilson. For the purpose of the record, let
437 me make objection to this line of inquiry. I submit it is wholly unimportant what discussion may have taken place with the Judge prior to imposition of sentence; that the sentence which was imposed in the case is the only material thing to be considered, even if that be material.

The Witness. Shall I answer?

Mr. O'Connell. Please read the question, Mr. Reporter.

The Reporter (reading):

"Question. It was understood that the suspension of sentence was conditioned on the payment of $1,000 and costs?"

The Witness. May I answer it in my own way?

By Mr. O'Connell:

Q. Yes. A. A conference with Judge Warlick was attended by counsel on both sides, as well as the private prosecution counsel, Mr. Harkins—

Q. Ford and yourself? Nettles? A. Mr. Harkins and Mr. Williams and Solicitor Nettles.

We discussed whether or not we would appeal the case; and, in fact, I advised an appeal, believing and advising that the law would sustain an appeal.

Mr. Wilson. It is understood that my objection goes to all this.

The Witness (continuing). Judge Warlick then stated in substance—of course, I would not undertake to quote in exact terms, because it has been three or four years—that
438 he had decided to assess a fine of a thousand dollars and all the costs, and that if we would abandon the appeal, that would be his judgment.

By Mr. O'Connell:

Q. Was it understood that that was to close the case? A. That was certainly my understanding: that if the defendant remained on good behavior for five years and violated no law or statute of the State of North Carolina,

that would close the case, and I thought everybody understood it that way.

Q. Is it not a fact that Pelley waived his rights of appeal of the verdict because of Judge Warlick's proposed settlement on a basis of a fine and costs both approximating one thousand eight hundred, which were understood to cover both counts, the good-behavior stipulation being likewise understood on both counts?

Mr. Wilson. I object to this as well, my understanding being that this question is confined to the conversation that took place prior to the imposition of sentence. The ground of my objection is the same as that of the previous objection.

The Witness. On his own judgment and on the advice of counsel, he chose to pay the fine and costs rather than to appeal. There was no waiver; it was just a decision as to the two remedies. I don't think there was any waiver filed or any legal paper filed, but he did pay and did abandon the appeal because of the fact that he decided that he preferred to pay the costs and fine and have it over with.

By Mr. O'Connell:

Q. Is it not a fact that because of the above settlement covering both counts, Judge Warlick purposely avoided instructing the defendant to remain within the juris-
439 diction of the Court? A. That calls for my statement of the state of mind of Judge Warlick. I don't believe that I can answer that.

Q. Did Prosecutor Nettles raise any objection to the verdict delaying sentence on count two for five years? A. Not at all, so far as I remember. There was some argument before the Judge about what ought to be done, but when he finally agreed upon the statement that is contained in the official sentence, everybody concurred in it, and it was generally satisfactory all around, so far as I knew. I was the only one really objecting to it; I wanted to appeal the case.

Q. Do you recall whether or not Prosecutor Nettles made a statement just prior to the imposition of sentence in which he said that due to the fact that Pelley had criticized him publicly, he would ask for a thousand-dollar fine? A. I don't remember that.

Q. Do you recall whether or not any assurances were given in the presence of Mr. Pelley that the payment of his fine and court costs and the non-breaking of any state statutes during the five-year period automatically discharged him for further jeopardy of any nature in this case? A. My recollection is that that was stated in the conference with the Judge and that the counsel all had that understanding; and following that, Mr. Pelley raised the money, I understood, by having it wired to him from friends in different parts of the country.

Q. From your experience as a member of the bar of the State of North Carolina, can you tell us whether or not an extension or a period of suspension of sentence of
440 more than five years is against the law? A. It is against the practice, and I know of no law that allows it, unless there is a breach of the conditions of the original suspension. In that case there would merely be an arrest and a sentence under the original sentence because of a breach of the terms of the suspended sentence.

Q. Have you ever heard of anybody breaching a suspended sentence without violating the law?

Mr. Wilson. I object to that question—

The Witness. That calls for a conclusion.

Mr. Wilson (continuing). —as to an individual case. If you want the opinion of this witness on the law of North Carolina, I think that would be a proper inquiry; but if you are asking him to narrate particular incidents which reflect the practice down there, I object to it.

By Mr. O'Connell:

Q. Answer the question, and we will let the objection stand, Mr. McNeill. A. Read the question, please, Mr. Reporter.

The Reporter (reading):

"Question. Have you ever heard of anybody breaching a suspended sentence without violating the law?"

The Witness. Do you mean, Mr. O'Connell, some statute for which he was indicted, or any law?

By Mr. O'Connell:

Q. No, any law. A. It is my understanding of the North Carolina law and decisions thereunder that a breach
441 of good behavior is being guilty of conduct which violates some existing law of the state. I would not like to put that down now as a decision that is final, because I have not kept up with all the decisions or statutes in recent years.

I have always understood the law to be that when a sentence was suspended, if the defendant performed the conditions of that suspended sentence—that is, behaved himself in so far as violating the statutes of that state were concerned—at the end of that time he was scot-free of any further punishment, and I have no doubt in the world that that is what Mr. Pelley believed and that all the counsel shared that belief at the time.

Mr. Wilson. I move to strike out the latter part of that answer, beginning with "and I have no doubt," upon the ground that it is a conclusion of the witness, is hearsay, and is otherwise incompetent.

By Mr. O'Connell:

Q. Was there anything said, either during your conference with the Bench or in open court, that it was possible under the wording of the order of sentence and suspension thereof for the Court arbitrarily to bring in either Pelley or Summerville for sentence at any time within five years, without anything more? A. Nothing to that effect was said.

Mr. O'Connell. You may examine.

Cross-Examination

By Mr. Wilson:

Q. Mr. McNeill, I want to read to you the judgment which was entered in the Superior Court in the February term, Criminal, 1935, in the case of—

Mr. O'Connell. February 18, wasn't it?

442 Mr. Wilson. Yes, February 18, 1935.

By Mr. Wilson.

Q. (Continuing)—in the case of State vs. William Dudley Pelley and Robert C. Summerville, judgment No. 13, which document is included within the certified papers which accompanied the requisition of the Governor of North Carolina for the extradition of William Dudley Pelley.

I want you to have in mind the question which I shall propound at the end of the reading of this judgment, to ascertain whether this judgment fails to reflect the sentence which was imposed on Pelley and the disposition of the case under the two grounds. A. All right.

Q. I read:

"For the purpose of judgment hereafter to be pronounced in the above-entitled causes and the making of the record in the same, it appears that the trial of the matter above entitled consumed thirteen full days and went over for final determination into the fourteenth day, the defendants, along with two other companion defendants, having been charged in the bill of indictment, containing 16 counts, with certain violations under the statutes numbers 2059, et cetera, being the Capital Issues Law of North Carolina, Chapter 149 Public Laws of 1927, and that at the conclusion of the evidence for the State, upon motion, 13 of the original counts therein were dismissed and a verdict of Not Guilty entered. That thereupon three counts were submitted to the jury, and in its verdict the jury returned

443 a verdict of Not Guilty on another of the counts, leaving verdicts of guilty on two counts as against the two defendants Pelley and Summerville named above."

Now, Mr. McNeill, I have come to the conclusion of the first paragraph. Does your memory cause you to find any fault with the statement I have just read to you? A. No, sir.

Q. I shall continue to read:

"The judgment of the Court is as to both defendants, the judgment being individual, that the defendant Pelley be confined in State's Prison at Raleigh, at hard labor, for a period of not less than one nor more than two years.

"The foregoing sentence of imprisonment is suspended for a period of five years, on the following conditions:

"One—"

Before I state "one," does that accurately reflect the beginning of the sentence on that first count? A. According to my memory, yes.

Q. I just read, Mr. McNeill, the statement:

"that the defendant Pelley be confined in State's Prison at Raleigh, at hard labor, for a period of not less than one nor more than two years."

A. I think I said in my testimony one year. I think what you have read is correct.

Q. Then, I continue:

"The foregoing sentence of imprisonment is suspended for a period of five years, on the following condi-
444 tions:"

Is that suspension correct? It was for five years? A. According to my memory, it was.

Q. I shall now read the conditions:

"One. That the defendant Pelley pay a fine of one thousand dollars and the costs of the case, which bill of cost has been approved by the Court as made up by the Clerk, and which, under the authority of the Court, is to include the total amount ordinarily for which the bill is made up by the Clerk, together with the exact amount which Buncombe County has heretofore paid out for the expenses of the jury during the 13 days and the expenses of the official court stenographer, it being the intent of the Court to reimburse fully the county for each amount expended by it."

Do you find any fault with that condition? A. No, sir; that was what the Court said.

Q. "Two. That the defendant be and remain continuously of good behavior."

Have you any fault to find with that condition? A. That was what the Court said.

Q. "Three. That he not publish and/or distribute in the State of North Carolina any periodical which has to do with, or contains in it, any statement relating to a stock sale transaction or any report of any corporation as to its financial value, with the purpose of effecting a sale of stock in said corporation, without complying with the capital sales issue statute."

A. That is correct.

445 Q. "Judgment of the Court is, as to defendant Summerville, that he be confined in the State's prison at Raleigh, at hard labor, for a period of not less than one nor more than two years. The foregoing judgment of imprisonment is suspended for a period of five years, on the following conditions:"

You need not trouble yourself to answer that, Mr. McNeill, because that pertained to the other defendant, and at the point where I leave off there appear three paragraphs, numbered, respectively, "1," "2," and "3," pertaining to the conditions of Summerville's sentence.

Then there is a concluding paragraph in this judgment, as follows:

"On count No. 2 against the defendants Pelley and Summerville, prayer for judgment continued for five years."

Is that correct? A. That is my recollection.

Q. That completes the judgment. Will you state whether or not the judgment as actually pronounced by the Court varied from the judgment which I have read to you? A. I do not think it did.

Q. By your answer do you mean that the judgment as pronounced and the judgment as read to you are, according to your memory, identical? A. Yes, sir.

Q. Were you in court when this judgment was pronounced? A. I was.

Q. Was William Dudley Pelley present in court
446 at that time? A. He was. It was in open court. The following morning after the conviction, according to my recollection.

Q. Was any appeal actually noted from this judgment? A. My recollection is that there was no appeal noted. It

was discussed with the Court and with the defendant by his counsel, but there was no official notation of an appeal, according to my recollection.

Q. Was any objection interposed by you or by Pelley to the terms of this judgment as pronounced by the Court after it was pronounced? A. No, sir, not afterward. I argued against the amount of fine and the costs before it was imposed, but finally it was accepted and no objections were made afterward.

Q. After the imposition of this judgment, no objection was interposed? A. No, sir.

Q. And, as you say, no appeal was taken? A. No, sir.

Q. As an all-inclusive question, there was no objection to the fact that the judgment upon the first count was suspended for a period of five years on certain conditions, while in respect of the second count the prayer for judgment was continued for five years? A. You speak of the first and second counts. Assuming those were the two on which the conviction was had—

Q. (Interposing) That is correct. A. (Continuing)—then I will answer your question that there were no objections to the fact that the conditions of the two counts
447 were different or that the suspensions were on different terms.

Q. After the imposition of sentence were there any discussions by you or by your client with the Court which operated to modify the terms of the judgment? A. My recollection is that there were none. The effort immediately after the judgment was to get hold of the money to meet the terms of it.

Mr. Wilson. That is all.

Redirect Examination

By Mr. O'Connell:

Q. Do you know of your own personal knowledge that the thousand dollars and costs were paid into court? A. I do.

Mr. O'Connell. That is all.

Mr. Wilson. I have nothing else.

ROBERT H. McNEILL

Subscribed and sworn to this 27th day of March, A. D. 1940.

LLOYD L. HARKINS

Notary Public in and for the District of Columbia.

My commission expires September 1, 1942.

448 UNITED STATES OF AMERICA
District of Columbia

I, Lloyd L. Harkins, a notary public duly commissioned and qualified in and for the District of Columbia of the United States, aforesaid, do hereby certify that, pursuant to notice, there came before me on the 27th day of March, A. D. 1940, at 2 o'clock p. m., in the office of T. Edward O'Connell, 424 Fifth Street, Northwest, Washington, D. C., the following-named person, to wit, Robert H. McNeill, who was by me duly sworn to testify the whole truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause, and that he was thereupon carefully examined, upon his oath, and his examination reduced to writing under my supervision; and that the deposition is a true record of the testimony given by the witness; and that the said witness read the same and subscribed his name thereto.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 27 day of March, A. D. 1940.

LLOYD L. HARKINS

Notary Public in and for the District of Columbia.

My commission expires September 1, 1942.

449 Filed Jul 26 1940 Charles E. Stewart, Clerk

In the Superior Court

Order #206 T. H. C.

NORTH CAROLINA
Buncombe County

STATE
v.
W. D. PELLEY

The Court having issued a capias for the above named defendant and it appearing to the Court that there exists in Buncombe County much material evidence which is necessary and important for the State in this matter.

It is, therefore, Ordered that the Sheriff of Buncombe County be, and he hereby is authorized and directed to take possession of any material or thing of any nature whatsoever, wherever the same may be found, which may be of any materiality to this cause or any other criminal action against the said W. D. Pelley of any nature whatsoever, and hold and preserve said material or thing or things as evidence until further orders of this Court.

This the 19th day of October, A. D. 1939.

.....
Judge Presiding

450 Filed Jul 26 1940 Charles E. Stewart, Clerk

Head of Silver Shirts is Cited to Court

ASHEVILLE, N. C., Oct. 19—(AP)—William Dudley Pelley, head of the Silver Shirts of America, was cited today to appear in Superior Court here on charges of violating the conditions of two suspended sentences, including allegations that he had "consorted with known enemies of American institutions," distributing publicity aimed at the "overthrow of our government," and "leveled disgusting epithets at the office of the President of the United States."

Superior Court Judge Zeb Nettles issued a capias ordering that Pelley be taken in custody and required to give $10,000 bond for his appearance at the November term of court.

Nettles explained that he did not direct that the Silver Shirt chieftain be brought before him immediately because he was solicitor when Pelley was convicted in 1935 on charges of violating the state "blue sky" law and of fraudulent misrepresentation in connection with the operations of Galahad College and the Galahad Press, both enterprises under Pelley's control.

On the "blue sky" charge, Pelley was sentenced to pay a fine of $1,000, and to serve one to two years in prison, suspended upon conditions that he refrain from the alleged illegal activities, and upon the second charge prayer for judgment was continued upon condition that he conduct himself properly.

Another allegation made in the judge's order today was that there were "many reasons" to indicate Pelley was being financed by "foreign and un-American sources."

The Dies Committee, investigating un-American activities, recently sought to bring Pelley before it to answer questions about his Silver Shirts organization and other activities but the committee representatives reported they were unable to find him and serve a subpoena upon him.

451 Filed Jul 26 1940 Charles E. Stewart, Clerk

State of North Carolina
Governor's Office
Raleigh

Clyde R. Hoey
Governor

March 28th, 1940.

General Albert L. Cox,
Attorney at Law,
Shoreham Building,
Washington, D. C.

My dear General:

I have your letter of March 27th, 1940, and thank you for the interest which you have manifested in my behalf in trying to have me relieved from attendance in the Pelley trial. In the event Mr. O'Connell refuses to release me, I will appreciate it greatly if you will take the matter up with the Judge. You are authorized to say to Mr. O'Con-

nell that I do not know anything in the world about the transaction with reference to Mr. Pelley in any particular, except that I received in the mails an application from the Solicitor of the District asking for the extradition, and it was made out in proper form and I granted it in the regular routine incident to the office.

I had no discussion with anybody about it and have no information with reference to the case in any way except such as revealed in the application for extradition, which was honored and forwarded to the District of Columbia. However, if there is any statement about any matter that I have any information about that either Mr. O'Connell wishes or the court desires, I will be glad to answer any such inquiries under affidavit and forward.

I have several engagements and it is a practical impossibility for me to get away to go to Washington on April 3rd, and my whole schedule through April and May is crowded. I am sorry to bother you, General, about this matter, but it will be a very great convenience to me if I may be relieved of the obligation to attend court
452 about a matter of which I have absolutely no knowledge and cannot testify to anything that would either help or injure the chances of Mr. Pelley.

With sentiments of esteem and regard, I am

Yours very truly,

CLYDE R. HOEY

453 Endorsed: Filed Jul 26 1940 Charles E. Stewart, Clerk.

Rep. Dies Strikes Back at Silver Shirt Chief.

Seeks to Have Suspended Term Against Pelley Put Into Effect.

Washington Bureau of The Asheville Citizen.

Washington, Sept. 11.—Chairman Martin Dies (D., Tex.) of the house committee investigating un-American activities, will move to have a suspended prison sentence, pending in North Carolina against William Dudley Pelley, put into effect, he declared today.

The announcement came as a sequel to Pelley's suit, filed Saturday in federal district court here, seeking $3,150,000 damages from Dies, members of his committee, and a committee investigator. Pelley maintains headquarters in Asheville as chief of the Silver Shirts, an organization the Dies committee has been investigating.

Dies first greeted news of the suit with apparent indifference, but following receipt of information from his congressional district in Texas that Pelley allegedly has been conducting an extensive propaganda campaign against him, the Texan hit back.

Pelley was convicted in superior court in Asheville of violation of the state capital issues law, and sentenced to from one to two years in prison. The sentence imposed Feb. 18, 1935, was suspended for a period of five years, on payment of a fine of $1,000 and the costs amounting to $719.50. It is this sentence, which was suspended on condition of good behavior for the five-year period, that Dies would have put into effect.

Dies said he would get in touch with the solicitor of the Asheville district immediately, and request him to ask the court to put the sentence into effect.

"If this fails", the Texas congressman declared, "I intend to have criminal libel action brought against Pelley by the authorities in the second Texas congressional district, and I may even sue him myself."

Advised Of Pamphlets

Dies said he had received several telegrams about pamphlets Pelley is alleged to be circulating in the Texan's district, pamphlets he believes are aimed at defeating him should he run for reelection to congress.

He said he would base the libel actions on the "underground propaganda campaign" he charges is being carried on by Pelley in his district. Dies said the campaign, apparently backed by a large amount of money, attacks both him and his committee. I have evidence that one business man in Houston ordered 5,000 of these pamphlets."

Pelley's suit against Dies and other members of the house committee is based on allegations made by committee members during the recent investigation of Pelley and his Silver Shirts. The committee made an unsuccessful

search for the Asheville publisher, in order to subpoena him before it.

Solicitor Robert M. Wells, of the nineteenth North Carolina judicial district, last night said he had received no request from Rep. Martin Dies that a suspended sentence pending against William Dudley Pelley be put into effect.

454 Endorsed: Filed Jul 26 1940 Charles E. Stewart, Clerk.

Dies Group Sends Investigator Here for Pelley Probe

Comes Here By Airplane For Brief Conference With Authorities

Files Examined By Prosecutor

Tax Collector Attaches Printing Equipment In Biltmore Plant

The Dies committee investigating un-American activities sent a representative here from Washington yesterday by airplane as Buncombe county superior court authorities began examining behind locked doors records of William Dudley Pelley confiscated Thursday under a court order.

Attendants at the Asheville-Hendersonville airport said a government plane landed at the field late yesterday afternoon and took off for Washington approximately an hour and a half later.

From other sources it was learned Robert Barker, Dies committee investigator, conferred briefly with officials in the courthouse and then returned to Washington.

'Not Ready To Discuss Purpose'

Chairman Dies of the house investigating committee announced in Washington that an investigator had been dispatched to Asheville "for a purpose we are not ready to discuss yet."

It was indicated in Washington, according to an Associated Press dispatch, that the agent was sent here in connection with an investigation of Pelley, who has been the object of a committee search.

In superior court here Judge Zeb V. Nettles, who issued a capias Thursday for Pelley's arrest and then signed an order directing Sheriff Brown to seize any records that might be used as evidence, placed his name on a second order yesterday appointing Robert R. Williams and Thomas J. Harkins to represent the state in the matter.

This was done to avoid embarrassing Solicitor Robert M. Wells who served on Mr. Pelley's defense counsel when the Silver Shirt leader was convicted in Buncombe county superior court in 1935 of violating blue sky laws and making fraudulent representations.

Williams Examines Records

Pelley is under a suspended sentence in one of these cases, and judgment has never been entered in the second. It is on the latter that the state is expected to act when Pelley is apprehended.

Meanwhile at the courthouse Mr. Williams began examining the voluminous files and records of Pelley publishers. These were seized at Pelley's headquarters in the old Asheville-Oteen bank building at Biltmore.

Upon reports that a truck was seen removing furnishings from the publishing house late Thursday night, Tax Collector William A. Swain, Jr., yesterday attached all printing equipment in the plant.

Mr. Swain explained that the machinery is listed for taxes under the name of Mrs. M. Heley Pelley and that there is approximately $275 due in taxes on it.

According to the levy made by Mr. Swain, the equipment will be sold at auction on November 3 unless taxes are paid by that time.

Owes Back Taxes

Mr. Pelley, Mr. Swain said, owes back taxes on personal property valued at approximately $5,000. He said he had levied on this property also, but was unable to locate it yesterday. He pointed out that the listing was made by the board of tax supervision in bulk, after Mr. Pelley did not list his taxes.

The levy was made by Mr. Swain upon the advice of the county attorney after the tax collector's office had been in-

formed some property was being removed from the Pelley building.

While Mr. Williams was going through documents, records, correspondence files, publications and other material seized under the court order, sheriff's deputies were continuing a search for Pelley himself.

455 *Nettles Orders Sheriff to Seek Silver Shirter*

Judge Announces Plan to Place Pelley Under $10,000 Bond.

Raps His 'Propaganda'

Says Defendant Has 'Broken Promises' Made to Court in 1935.

A capias was issued in Buncombe county superior court today for the arrest of William Dudley Pelley, self-styled chieftain of the Silver Shirts legion.

Judge Zeb V. Nettles, presiding, ordered the court clerk to issue the capias just prior to noon today. At the same time, Judge Nettles read a prepared statement setting forth that Pelley's "breaking of promises" made at the time he was convicted in superior court here in 1935 prompted the issuance of the capias.

Judge Nettles also cited Pelley's engaging in "practices and propaganda which deserve the severe condemnation of all good American citizens."

Search Skyland Press

The capias was promptly turned over to the sheriff's department and deputies sheriff were sent to Pelley's Skyland Press and Silver Shirts headquarters at Biltmore to make the arrest. The deputies searched the building, and failing to find Pelley, informed his secretary that Pelley or his attorney was directed to get in touch with Sheriff Laurence E. Brown or the sheriff will take "further action."

It was understood that the whereabouts of Pelley was not revealed at his headquarters, the former Biltmore-Oteen bank building which he purchased some time ago.

The judge directed Sheriff Brown to make every effort to apprehend Pelley and bring him into court in order that Pelley could be placed under a bond of $10,000 for his appearance before Judge J. A. Rousseau at the November term of superior court.

Convicted in 1935

Pelley, whose activities with the Silver Shirts have been in the spotlight of the Dies committee's investigations of un-American activities recently, was convicted in the superior court on two "distinct felonies" at the February term in 1935. One was violation of the blue sky laws and the other was a crime "involving high moral turpitude, namely, that of making fraudulent representations," Judge Nettles pointed out in court today.

Pelley was sentenced for from one to two years in State's prison on the blue sky law violation, and the prison sentence was suspended by Judge Wilson Warlick, presiding, on payment of a fine of $1,000 and the costs upon condition the defendant "be and remain continuously on good behavior."

On the conviction for fraudulent representations, Judge Nettles pointed out, prayer for judgment was continued for five years.

Both Pelley and an associate, Robert C. Summerville, were convicted on two counts in the 1935 trial. Among the conditions on which the prison sentences were suspended was the condition that Pelley make immediate payment of the $1,000 fine and costs of the trial, which totaled $719.50.

Other Conditions

The prison term of Pelley was suspended on the following other conditions:

1. That he continue of good behavior for a five-year period.

2. That he not publish or distribute in North Carolina any periodical, and particularly anything that has to do with stock sale transactions or reports of corporations. Similar conditions were imposed on Summerville.

Sometime later, 1936, Pelley announced his candidacy for president of the United States on a platform of "For Christ and the Constitution."

It was in 1928 at Pasadena, California, that Mr. Pelley says he had an experience which changed his life. At the time, Pelley allegedly "died." He was supposed to have remained dead for only "seven to 10 minutes" and then returned to earthly existence. This incident in Pelley's life won him wide notoriety.

It was understood that an attorney named Hatfield from Washington, D. C., was in Asheville to represent Pelley in the current action by Superior Court Judge Nettles. An Asheville attorney went to the sheriff's department today to obtain a copy of Judge Nettles. An Asheville attorney went to the sheriff's department today to obtain a copy of Judge Nettles' statement read in court just before noon, explaining that the copy was desired by the Mr. Hatfield, who was an attorney for Mr. Pelley.

Weaver Asked Probe

Mr. Pelley's name has been associated with a number of developments in Washington (D. C.) news in recent months. In August, Representative Zebulon Weaver of this district of North Carolina moved for a congressional investigation of Pelley's activities, charging that Pelley was "stirring up unrest among Indians" on the Cherokee reservation in Western North Carolina.

A subpoena for Pelley was issued by the Dies committee in connection with its investigation of his Silver Shirts interests, but the man was not located. The Dies committee sought to have Pelley testify regarding alleged efforts of the Silver Shirts to "sabotage" the work of the committee.

"Broken Promises"

"Since these convictions," Judge Nettles said, "this court has been informed Pelley has not only broken the promises which he made to the court, but has engaged in practices and propaganda which deserve the severe condemnation of all good American citizens. He has continued to prey upon and collect money from credulous neurotic people to his own enrichment by appealing to their basest religion, moral, racial and social prejudices. He has attempted to reap financial profit by engaging in every possible form of un-American activities. He has leveled disgusting epithets against the office of the president of the United States. He has consorted with known enemies of American institutions. There are many reasons to believe that he is being paid from foreign and un-American sources."

In ordering the clerk to issue the capias for Pelley's arrest, Judge Nettles requested Robert R. Williams and

Thomas J. Harkins, leading attorneys here, to present the matter whenever Pelley is brought into the court. This was done, the judge pointed out, in order not to "embarrass" Solicitor Robert M. Wells, who, in 1935, was a member of the defense counsel for Pelley during his trial.

Text Of Statement

The prepared statement read by Judge Nettles at the time he ordered the capias issued for Pelley is as follows:

"At the February term, 1935, W. D. Pelley was convicted in this court for two distinct felonies, one for violating the Blue Sky laws, and the other for a crime involving high moral turpitude, namely that of making fraudulent representations. At that time information came to the attention of the court that Pelley was collecting sums of money from credulous people by playing upon their religious, racial and social prejudices and fears. It was suggested even at that time that he was being paid for his propaganda by sinister foreign sources. He pleaded for mercy and promised to lead a decent life.

"Pelley was sentenced for one to two years in the state's prison on one of these convictions, but on account of these assurances, Judge (Wilson) Warlick, a humane and just judge, suspended the prison sentence for five years upon payment of a fine of $1,000 and costs and upon condition that the defendant "be and remain continuously on good behavior."

"On the conviction for fraudulent representations, prayer for judgment was continued for five years.

"Deserves Condemnation

"Since these convictions, this court has been informed Pelley has not only broken the promises which he made to the court, but has engaged in practices and propaganda which deserve the severe condemnation of all good American citizens. He has continued to prey upon and collect money from credulous neurotic people to his own enrichment by appealing to their basest religious, moral, racial and social prejudices. He has attempted to reap financial profit by engaging in every possible form of un-American activities. He has leveled disgusting epithets against the office of the President of the United States. He has con-

sorted with known enemies of American institutions. There are many reasons to believe that he is being paid from foreign and un-American sources. He is now said to be conducting his nefarious practices from some secret hiding place; made afraid by his knowledge of his own wicked misdeeds, to face in public his fellow American citizens.

Enjoys Laws' Protection

"Here is a man enjoying the protection of our laws. He has deliberately violated our laws against crime. He is a felon. Such conduct on his part would in the country he professes to ape, admire, love and respect, forfeit his life. He deals in accusations, loud boastings, preens his feathers like a peacock and struts upon the stage of life, falsifying facts and hurling accusations. In his desperation to gain attention and occupy the spotlight, he has even accused our great President of high crimes and misdemeanors. He professes to be a friend of the American people and at the same time advocates class, racial and religious hatred.

"It is not those, Mr. Solicitor, from without that we must watch, but those so-called saviours of mankind who are preaching a doctrine deadly to American institutions. This defendant who has been moving in our midst seeking to further the cause of Naziism with himself as the dictator, seeking to destroy justice and liberty and abolish all laws, living under the very protection of that law he is seeking to overthrow and trying to undermine our system of government. Such a man cannot deserve the blessings of a government like ours. He is a menace to our society. Gratitude is one of the most beautiful attributes of human character. This man 'smites' the hand that feeds him and has the unenviable record and distinction of being a contemptible ingrate.

"Helped Unravel Course"

"We do not have to defend our system of government from a character or individual. For three weeks I sat here in this very courtroom and helped unravel a course of crooked dealing, thievery and stealing sufficient to damn any man, much less this contemptible seeker after notoriety, W. D. Pelley, so-called and self-styled leader of the Silver Shirts, convicted felon, not now even a citizen of

our country. A Buncombe county jury says he is not, yet he would be our dictator and would tell our country what to do.

"We have diffused in this great land of ours well-being among the whole population to an extent without parallel in any other country in the world. We have furthered peace-keeping, peace-loving, among our peoples; we have set a splendid example of the broadest religious toleration and freedom, and we have welcomed newcomers from all parts of the earth and have proved that they are fit for political freedom. These are some of the practical things we have accomplished in this great nation of ours. They are the triumphs of reason, enterprise, courage, faith and justice over passion, selfishness, inertness, timidity and distrust.

"Man's Work To Do"

"In these days of trouble and of daily national emergencies, there is a great comfort in the thoughts and recollection of Washington, Jefferson, Jackson, Lincoln, Wilson and hundreds of other great Americans who gave their lives that our country might live. The zeal of justice, of learning and humanity lies deep in the American heart. Whenever a man tries to tear down the institutions of this great democracy by boring from within, Mr. Solicitor, then I say that we should be on our guard and get to work. It is well to be a gentleman and a scholar, but after all it is better to be a man ready to do a man's work and face the practical things of life.

"We have a man's work to do in making democracy work here in this nation of ours; to preserve its institutions, its freedom, its Christianity, is men's work. We must preserve and obey our laws. We must enforce our laws. We must be tolerant. We must be religious. We must do our utmost to carry on where our fathers and mothers left off in order to hand down to our children a better citizenship, but eternal vigilance is the price of liberty.

"Owes Debt To Society"

"W. D. Pelley has set up in our midst a printing press and is sending out to the country at large messages devoted

to bigotry, class and racial hatred, religious intolerance, with the end in view of overthrowing our government. He owes a debt to society, Mr. Solicitor, for his criminal conduct, having been heretofore convicted of two felonies in this county.

"I direct you, Mr. Clerk, to issue a capias for the arrest of this man and have him brought before this court, Mr. Sheriff, to be dealt with under the law and justice. Mr. Sheriff, I hope that you will make every effort to apprehend this man and bring him before this court in order that he may make a bond in the sum of $10,000 for his appearance before Judge (J. A.) Rousseau at the November term of this court.

"Mr. Solicitor, I would not want to embarrass you at all in this matter, and on account of your connection with the case, I will request Mr. R. R. Williams and Thomas J. Harkins to present the matter whenever he is brought before the court.

Judge Nettles expressed the opinion that any action of the court would be based on the second count, in which prayer for judgment was continued for five years. He said he regarded the other count as finally disposed of with the payment of the fine and costs.

Attempts of a Times reporter to reach William Dudley Pelley at his headquarters in Biltmore today were unsuccessful.

A reporter telephoned the Skyland Press office of Pelley a short time after the capias for the Silver Shirts leader's arrest had been issued in the superior court. A woman answered the telephone.

456 Filed July 26, 1940 Charles E. Stewart, Clerk

Believes Pelley Will Escape Conviction Here

Solicitor Wells Expresses
Opinion Evidence Lacking
To Convict Leader

That the state has insufficient evidence to build up a case against William Dudley Pelley, leader of the Silver Shirts, was the opinion expressed yesterday by Solicitor Robert M. Wells to an Asheville Advertiser representative. Mr. Pelley, who eluded capias servers for several months finally

came out of his burrow before the Dies Committee. He is out on $2,500 bond for a hearing in Asheville on March 12.

Solicitor Wells pointed out that the Federal Government had no damaging facts to hold Mr. Pelley on and predicted that he would be freed here unless the state has evidence of which he is now ignorant.

It is contended on one hand that Mr. Pelley's recent activities have violated provisions of a suspended sentence, while a contrary opinion points out that Buncombe County has no case, as the Silver Shirt leader was not held for federal violations. Several years ago, before holding an elective office, Solicitor Wells represented Mr. Pelley in a legal capacity.

457 Endorsed: United States Court of Appeals for the District of Columbia Filed Aug. 3 1940 Joseph W. Stewart Clerk.

In the United States Court of Appeals for
The District of Columbia

Court of Appeals No. 7734

WILLIAM D. PELLEY, *Appellant*

vs.

JOHN B. COLPOYS, *Respondent*

Designation of Record for Printing

The Clerk of the Court will please print the transcript of record herein as filed, except to omit the following portions:

1. Page 453—All except article entitled "Representative Dies strikes back" etc.—through "be put into effect."
2. Page 454—All except article entitled "Dies group sends investigator" etc.—through "for Pelley himself."
3. Page 455—All except article entitled "Nettles' Orders" etc.—through Page 455-A "answered the telephone."
4. Page 456—All except article entitled "Believes Pelley will escape"—through "in a legal capacity."

T. EDWARD O'CONNELL
Attorney for Appellant,
424 5th St., N. W.,
DIstrict 5560

Copy of the foregoing acknowledged this 3rd day of August, 1940.

ARTHUR B. CALDWELL
Assistant District Attorney

I consent to the above designation.

ARTHUR B. CALDWELL
Asst. U. S. Atty.

Endorsed on Cover: No. 7734 William D. Pelley, Appellant vs. John B. Colpoys United States Court of Appeals for the District of Columbia Filed Jul 31 1940 Joseph W. Stewart, Clerk.

Supplemental Transcript of Record

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1941.

No. 7734

WILLIAM D. PELLEY, APPELLANT,

vs.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 3, 1941

PRINTED FEBRUARY 6, 1941

United States Court of Appeals for the District of Columbia

Endorsed: United States Court of Appeals for the District of Columbia Filed Feb 3-1941 Joseph W. Stewart, Clerk

District Court of the United States for the District of Columbia

Habeas Corpus No. 2067

In re Habeas Corpus William D. Pelley, *Defendant.*

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, do hereby certify the annexed to be a true and correct copy of a certified copy of the First and Second Counts of Indictment returned by Grand Jury of the Superior Court of North Carolina, as they appear of record in the Clerk's Office of said Court in the above-entitled cause, the same to constitute supplemental record for Court of Appeals pursuant to Rule 75(h) of the Rules of Civil Procedure, in compliance with Order of Court of Appeals of January 29, 1941.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 31st day of January, 1941.

CHARLES E. STEWART,
Clerk,
By K. M. HARVEY,
Assistant Clerk.

(Seal)

1 Endorsed: United States Court of Appeals for the District of Columbia Filed Feb 3-1941 Joseph W. Stewart, Clerk

In the District Court of the United States for the District of Columbia

Habeas Corpus No. 2067

IN RE HABEAS CORPUS WILLIAM D. PELLEY.

Requisition #781

Filed March 12 1940

* * *

No. 13
formerly #600

In the Superior Court

August Term, 1934.

State of North Carolina County of Buncombe

STATE
VS
WILLIAM DUDLEY PELLEY, ROBERT C. SUMMERVILLE, DON D. KELLOGG, H. M. HARDWICKE

Bill of Indictment

First Count.

The jurors for the State upon their oath present that William Dudley Pelley, Robert C. Summerville, Don D. Kellogg and H. M. Hardwicke, late of the County of Buncombe, State of North Carolina, on or about the first day of April, 1932, and at divers other times before and after said date, with force and arms, at and in said County, did unlawfully, wilfully, knowingly, fraudulently and feloniously sell and cause to be sold, and offered for sale, and caused to be offered for sale, and solicited the sale and distri-

2 bution of securities and stocks of Galahad Press, Incorporated, a corporation organized under the laws of the State of New York, with its principal place of business in Asheville, North Carolina, to divers persons, through advertisement and otherwise, in a periodical and magazine published, mailed and distributed in said State and County, entitled "LIBERATION", and by let-

ters, circulars, etc., which said securities and stocks were not exempted by and not registered as provided in the provisions of Chapter 149 of the Public Laws of North Carolina, enacted by the General Assembly of North Carolina, Session of 1927, and Chapter 71A of the Consolidated Statutes of North Carolina and all acts amendatory thereof, without having first registered as a dealer and dealers, and salesman and salesmen in the Office of the Corporation Commission and Commissioner of North Carolina, as provided by Chapter 149 of the Public Laws of North Carolina, enacted by the General Assembly of North Carolina, Session of 1927, and Chapter 71A of the Consolidated Statutes of North Carolina and all acts amendatory thereof, against the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

Second Count.

The jurors for the State upon their oath further present that William Dudley Pelley, Robert C. Summerville, Don D. Kellogg and H. M. Hardwicke, late of the County of Buncombe, State of North Carolina, on or about the first day of April, 1932, and at divers other times before and after said date, with force and arms, at and in said County, did unlawfully, wilfully, knowingly and feloniously, and for the purpose of selling securities and stock of Galahad Press, Inc., a corporation organized under the laws of the State of New York, with its principal place of business in Asheville, North Carolina, in this State, fraudulently represent to the purchaser and purchasers, and prospective purchaser
3 and purchasers thereof, the amount of dividends, interest and earnings which such securities will yield, in a magazine, periodical and publication published, mailed and distributed in said County of Buncombe, State of North Carolina, entitled "LIBERATION", which said false representations as aforesaid were to the effect that:

"It is a fact surpassing strange that those who have been most active in the financial and moral support of the work done by the Galahad Press, The League for the Liberation, and The Foundation for Christian Economics this past year, have suffered few losses of note.

"The work which is being done throughout the nation in promoting these wholesome Christian principles, carries with it a sturdy, constructive vibration. The growth and

prosperity of the Galahad Press this year when other publishing projects were losing or failing on every hand, carries an esoteric significance not to be ignored.

"The first year of The Galahad Press closed on February 7. Starting on a cash capital of $40, it forged its way ahead in a time of continually falling markets and ruinous depression, gaining in volume of business month by month, until it had done $56,731.57 in amount of business for its first fiscal year.

"It printed and circulated nearly 150,000 copies of its publications, and in connection with The League for the Liberation it disposed of 90,000 copies of the weekly Liberation lessons. It paid out $22,372.83 in salaries to its workers and its item of postage alone reached $4,095.21. If its present rate of prosperity continues, it will meet its preferred stock dividend by its annual stockholders meeting-date in June."

****

"There remains in the treasury of The Galahad Press over $10,000 of preferred stock untouched by the volume of business transacted this past year. This stock is valued at $10 per share and pays a 6 per cent cumulative dividend,"—when in truth and in fact the said Galahad Press, Inc., a corporation organized under the laws of the State of New York, was not in a prosperous condition and was not in a position to meet its preferred stock dividends, and its preferred stock was not paying 6% dividend, and those who had been most active in the financial support of the work done by The Galahad Press had suffered losses of note, and the disbursements had been much heavier than set forth in said representations, and the said Galahad Press was in
4 an insolvent and failing condition and had lost heavily during the time mentioned in said representations, against the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

* * *

(Signed) ZEB V. NETTLES
Solicitor.

North Carolina
Buncombe County

In Superior Court

STATE

vs.

W. D. PELLEY, ET AL

State's Witnesses:
Stanley Winborne
W. Bowen Henderson X
Garland A. Thomasson X
Geo. S. Anderson

Those marked X sworn by the undersigned foreman and examined before the Grand Jury; and this Bill found.....
A True Bill.

JACOB F. WEAVER
Foreman Grand Jury.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1940.

No. 7734.

SPECIAL CALENDAR.

WILLIAM D. PELLEY, *Appellant*,

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA.

Appeal from the District Court of the United States for the District of Columbia.

APPELLANT'S BRIEF.

T. EDWARD O'CONNELL,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

TABLE OF CASES AND CITATIONS.

CASES:

CITATIONS:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1940.

No. 7734.

SPECIAL CALENDAR.

WILLIAM D. PELLEY, *Appellant,*

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA.

Appeal from the District Court of the United States for the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a final order of the District Court of the United States for the District of Columbia, discharging a Writ of Habeas Corpus and dismissing the petition upon which the writ was issued and remanding the appellant to the custody of the appellee. Jurisdiction of the District Court in Habeas

Corpus proceedings is authorized by the D. C. Code (1929, Title 24, Sec. 201, Title 18, Sec. 57, Title 28, U. S. C. Sections 451 et seq.; Rev. Stat. 751).

Jurisdiction of this Court to review a final order in a Habeas Corpus proceeding is acquired by virtue of the D. C. Code (1929, Title 18, Sec. 26), which provides for an appeal to this Court from any final order of the United States District Court for the District of Columbia. Provision for review by the Court of a final order is contained in 28 U. S. C., Sec. 463B, 43 Stat. 490, 48 Stat. 926. On March 12, 1940, the appellant filed in the District Court a petition for a Writ of Habeas Corpus (R. 1), alleging that he was illegally restrained from his liberty and in the custody of the United States Marshal for the District of Columbia, respondent herein, and alleging that the said respondent was holding appellant in custody for the purpose of handing him over to officers from the State of North Carolina, for the purpose of taking him out of the jurisdiction of the District Court of the United States for the District of Columbia to the State of North Carolina. The petition further set forth that appellant was in the United States Marshal's custody as a result of a decision by the Chief Justice of the District Court, who after conducting an extradition hearing, ordered that appellant be surrendered to the marshal for the purpose of returning him to the State of North Carolina. The petition set forth twenty-three (23) grounds attacking legality of appellant's detention. On March 18, 1940, return and answer on the part of respondent was filed, admitting the detention and giving as authority for said detention, the order of Chief Justice Wheat for appellant's surrender to the agent of the State of North Carolina. Re-

spondent denied allegations of appellant, one through twenty-three inclusive, of paragraph 4 of the petition, in which appellant attacked the legality of his surrender. *On information and belief* the respondent averred the facts to be as stated in the extradition papers. On the 5th day of April, 1940, Justice Jesse C. Adkins dismissed the petition and discharged the writ (R. 186) and on April 19, 1940, Justice Adkins denied appellant's Motion for a Rehearing (R. 187). On May 3, 1940, Justice Adkins filed Findings of Fact (R. 208) and conclusions of Law (R. 209). The present appeal is taken from the order of April 5, 1940 (R. 186).

STATEMENT OF FACTS.

Appellant was arrested in the United States Capitol, Washington, D. C., where he was in response to a subpoena of a Congressional Committee. The warrant of arrest was based on a capias issued in Buncombe County, North Carolina. He refused to waive extradition. The Chief Justice of the District Court ordered appellant's surrender. Appellant filed a Petition for Writ of Habeas Corpus and writ was issued. After Habeas Corpus hearing the lower court dismissed the petition and discharged the writ. This appeal is from the order dismissing the petition and discharging the writ. The record discloses the following facts:

At the January term of Court, 1935, appellant was convicted on two counts of a sixteen count indictment, in Buncombe County, North Carolina. On the 17th day of February, 1935, the Trial Judge, The Honorable Wilson Warlick, of the Buncombe County Superior Court, imposed an alternative sentence upon the appellant, the same being as follows:

One to two years imprisonment at hard labor, suspended on condition that appellant pay $1,000 fine, costs of Court ($716.00) and remain of good behavior for five (5) years and refrain from printing or publishing any pamphlets relating to a stock transaction in the state of North Carolina for five (5) years.

On the second count upon which appellant had been convicted, prayer for judgment was continued for five (5) years. Appellant *elected* to pay the fine of $1,000 and the costs of the entire proceeding (amounting to $716.00) and was then released, without any requirement that he remain within the state of North Carolina and without any requirement that he report to any agency of the state or of the Court.

The prosecutor in the aforementioned case, Zeb V. Nettles, has since become a judge in North Carolina. This entire proceeding originated with the issuance of a capias by this former prosecutor of appellant, now a judge, of his own volition (R. 229), without any complaint or request from the County Prosecutor and without any affidavit of any kind and without any suggestion from the judge who tried this case, the Honorable Wilson Warlick, who is still on the bench in Buncombe County.

The now Judge Nettles was assigned *by law* to another Judicial District of North Carolina for the October term of 1939, but with the permission of the Governor of North Carolina (R. 15), *exchanged courts with the judge who was assigned to Buncombe County.* On October 19, 1939, three days after switching courts, the former prosecutor of appellant, now a judge, at his own instance, issued capias for the arrest of appellant.

At the time of the issuance of the capias, appellant's former prosecutor, now judge, read from a previously

prepared unsworn manuscript (R. 259) a venomous, personal attack upon appellant and his political beliefs and expressed, in no uncertain terms, his own personal animosity toward appellant. The assertions in this manuscript are supposed to be the basis for the issuance of the capias in the attempt to drag appellant back to the state of North Carolina. Yet this manuscript, in its entirety, was never made part of the minutes of the Buncombe County Court or of the court record. The former prosecutor thus attempts to extradite appellant on the basis of a paper which is not even part of the court records, but which does appear in the files of the Buncombe County Court, as shown by the certification of the Clerk of that Court of Exhibit "E", (R. 262).

The Extradition Papers also contain a Certified Copy of an Order (R. 19), signed by the same judge, the former prosecutor of appellant, which clearly indicates that the demand is not for the purpose of according appellant a hearing, but that he "be brought before the Court for the purpose of imposing sentence." The said Order was signed February 19th, 1940, three days *after the expiration of the five year period.* This Order also contains a provision extending the period of suspension of sentence for an additional five years, though such action is specifically forbidden by the Criminal Code of the State of North Carolina, Sec. 4556, Par. 4. Counsel for respondent admits (R. 137) that the foregoing Order Extending Period of Suspension of Sentence "was useless" and (R. 156) "that it is unfortunate that the Order of February was issued" and that they are not relying on the order extending the time, but (R. 156) "are relying on the capias entirely."

The Lower Court found as a fact (R. 208) that appellant paid a fine of $1,000 plus costs, as a condition to suspension of a jail sentence; that appellant had never been charged with a violation of any state or Federal law since suspension of sentence (R. 209); that the issuance of the capias was not based upon any affidavit and that no affidavit whatsoever had been submitted to the judge who issued the capias. It was stipulated by both parties hereto that appellant was free to travel anywhere in the world he pleased, that he was not on probation, nor was he on parole.

Notwithstanding the foregoing, the Lower Court held the appellant to be a fugitive from Justice under a substantial charge of crime. The Lower Court ruled that all questions of double (or former) jeopardy, attacks on the jurisdiction of the Buncombe County Court, and charges of lack of good faith, or lack of due process, could only be raised by appellant in Buncombe County, North Carolina.

STATEMENT OF POINTS.

Appellant Relies Upon the Following Points, All of Which are Contained in the Assignment of Errors of Record in This Case:

1. The Court erred in holding that the Governor who requested extradition and who was subpoenaed within this jurisdiction may not be questioned, despite the Governor's own statement that he knows nothing about the case, while the same gentleman had included in his requisition papers for appellant's arrest, a copy of an executive order signed by the said Governor, transferring appellant's former prosecutor, now judge, from the judicial circuit to which he was lawfully assigned, to the Buncombe County Court,

where one of the first acts of the former prosecutor was to issue capias (R. 17) for the arrest of appellant.

2. The Court erred in dismissing the petition and discharging the writ.

3. The Court erred in failing to release petitioner on court's own Findings of Fact.

4. The Court erred in denying prayers of petitioner.

5. The Court erred in excluding testimony offered by petitioner.

6. The Court erred in refusing to admit in evidence defendant's Exhibits No. 1, 2, 3, 4, 5, 6 and 7.

7. The Court erred in denying the Motion for a Rehearing.

8. The Court erred in restricting the scope of the Habeas Corpus proceeding.

9. The Court erred in refusing to adopt petitioner's suggested Findings of Fact and Conclusions of Law.

10. The Court erred in holding that petitioner was a fugitive from justice, while at the same time, making a finding of fact that petitioner had never been charged in any court of any state, or of the United States, with any violation of law from the date of the suspension of imposition of sentence.

11. The Court erred in holding that petitioner was a fugitive, while at the same time making a finding of fact that no affidavit of any kind had been filed alleging a violation of law by petitioner.

12. The Court erred in holding that, even though petitioner was not charged with the breach of any condition of his suspended sentence, he was a fugitive when the capias was issued for him.

13. The Court erred in holding that petitioner was a fugitive from justice when a capias, not based upon an affidavit, was issued against petitioner, while the petitioner was absent.

14. The Court erred in concluding as a matter of law that petitioner was a fugitive from justice, while at the same time making a finding of fact, that petitioner had paid a fine of $1000, plus costs of $716.00, as a condition of suspension of sentence, and making a further finding of fact that no affidavit relating to a violation of the said conditions of suspension of sentence had been submitted to the judge who issued capias for petitioner, and that the aforementioned costs covered the entire case.

15. The Court erred in holding that petitioner's prosecutor, now a judge, might sentence petitioner to jail, without any showing of a violation of law, or breach of condition attached to suspension of judgment, while the judge, before whom the case was tried and who still sits on that bench, has never had occasion to cite petitioner for any violation of the terms of his suspension of sentence.

16. The Court erred in holding that a North Carolina Court may induce a defendant to waive his right of appeal by suspending sentence on one of two counts and suspending the imposition of sentence on the other count, and then revoke the suspension and impose the sentence, long after the time for taking an appeal has expired, at the whim or caprice of the judge.

17. The Court erred in holding that a man under a suspended sentence, or suspended imposition of sentence, becomes a fugitive without any allegation, by way of affidavit, of a violation of the conditions of said suspension, merely by the issuance of a capias.

18. The Court erred in holding that petitioner is a fugitive, although the judge who issued the capias for petitioner's arrest has stated under oath in this proceeding, that he knows nothing of petitioner's activities and although no affidavit has been filed, said judge refuses to reveal the source of information upon which the issuance of the capias was based. Record Nettles Deposition.

19. The Court erred in holding that the Buncombe County judge could select one of several defendants under a suspended sentence and impose sentence on that one defendant, without giving any reason for so doing, there being no allegation of a violation of the conditions of suspended sentence against any of the defendants.

20. The Court erred in holding that a prosecutor, who afterwards becomes judge, may exchange courts with the judge in the county where the case previously prosecuted by him was tried and then arbitrarily issue a capias for the defendant whom he prosecuted, without any affidavit being submitted alleging a violation of the conditions of defendant's suspended sentence.

21. The Court erred in holding that, although the petitioner had paid a $1000 fine and costs of the case at the time of sentencing and suspension of sentence, it thereby secured his waiver of all future rights of appeal in any subsequent action pertaining to further punishment growing out of his convictions, and that any attempts on petitioner's part to make the sentencing and demanding state keep faith with him in the item of probation and the terms thereof, was irrelevant.

22. The Court erred in holding that a judge of any county court of the United States may impose a fine, plus costs, and condition the suspension of sentence on one count on the payment of costs of an entire case, including stenographer's fee and continue the imposition of sentence for a period of five years and after the time within which an appeal might be taken has expired, call the defendant in from any part of the world and impose a maximum sentence according to the disposition of the county judge.

23. The Court erred in holding that the sentence on both counts was not concurrent.

24. The Court erred in holding that the conditions applicable to suspension of sentence on the first count, did not apply to the second count, upon which imposition of sentence was suspended, despite the fact that defendant had paid all costs of the entire proceeding and there was no provision in the judgment of the court that the sentences were to be consecutive.

25. The Court erred in holding that, although petitioner paid a fine of $1000, plus costs amounting to $716.00, to sentence petitioner at this time would not constitute double jeopardy.

26. The Court erred in holding that, although it is recognized that when an accused is convicted under an indictment or information containing two counts, that the sentence imposed on each count must run concurrently unless otherwise specified in said sentence, and that although it was not so specified and directed in the case of petitioner, and although there was no showing that petitioner had breached any of the conditions of the sentence, he was nevertheless under a charge of crime and subject to extradition.

27. The Court erred in holding that no inquiry may be made in the courts of the asylum state as to the justification or injustice of the demand for the return of petitioner, where a prayer for judgment has been continued.

28. The Court erred in failing to find as a fact, that petitioner was not required to remain within the confines of the State of North Carolina, although this was conceded by both petitioner and respondent.

29. The Court erred in concluding as a matter of law that the requisition papers substantially charged the petitioner with the commission of crime in the State of North Carolina, while at the same time making a finding of fact, that petitioner had not been charged with any crime since the suspension of sentence, or the suspension of imposition of sentence.

30. The Court erred in holding that only the judge in the demanding state may decide the question of whether or not that court has jurisdiction to demand the return of petitioner.

31. The Court erred in holding that the petitioner in this case should be extradited, notwithstanding that it is a fundamental principle of law that a prisoner cannot be sentenced at separate times under the same indictment and that the parties seeking extradition in these proceedings admit they seek so to do.

32. The Court erred in holding that a probationer, or one under a suspended sentence, against whom a capias has been issued in another state, has no recourse but to return to that state regardless of the fact that he has done nothing to violate either the law, or the terms of his probation, or suspended sentence.

33. The Court erred in holding that a judge may, at any time during the period of suspension of imposition of sentence, revoke said suspension, without giving any reason for so doing.

34. The Court erred in holding that it is not necessary to offer evidence of a charge of crime, or of the breaking of conditions of a suspended sentence to justify extradition. Not one word of testimony in the entire record charges petitioner with any law violation since the time of suspension of sentence, nor with any breach of condition attached to such suspension.

35. The Court erred in refusing to consider the law of the State of North Carolina, in deciding the questions of whether or not petitioner was a fugitive from that state and whether or not petitioner was substantially charged with crime so as to justify extradition.

36. The Court erred in holding that the question of whether or not petitioner had violated the terms of a suspended sentence could not be inquired into on Habeas Corpus.

37. The Court erred in holding that the offer by petitioner to show by the testimony of witnesses, that the judge had been prevailed upon to revoke a suspension of sentence, or imposition of sentence, to gratify personal malice of certain persons, was immaterial.

38. The Court erred in holding that the petitioner on Habeas Corpus may not interrogate a witness, properly subpoenaed and in court, with regard to whether or not that witness had procured the issuance of a capias in another state without any affidavit or justification in law, despite the fact that that witness

was a member of a committee, the chairman of which has publicly stated prior to the issuance of the capias, that "he was going to get Judge Nettles to impose the sentence which had been suspended by Judge Warlick." (R. 312)

39. The Court erred in refusing to permit petitioner to show that his extradition was sought to graitfy the personal malice of certain persons, while the record in the instant case discloses that the two special prosecutors from North Carolina refuse to disclose the source of their private compensation in this extradition and Habeas Corpus proceeding.

40. The Court erred in holding that one whose extradition is sought has no right to know who pays the compensation of his prosecutors, even though it be admitted that his prosecutors are receiving private compensation.

41. The Court erred in holding that, although petitioner's witnesses had been properly summoned, that the substance of the testimony of such witnesses must first be submitted to the court for approval before such witnesses could testify.

42. The Court erred in holding that the governor's seal upon the extradition papers precludes petitioner from offering any testimony tending to show that the papers are not in good order.

43. The Court erred in refusing to find as a fact that the judge of the Buncombe County Court had exceeded his authority in extending the five year period of suspension of sentence, when such fact was conceded by respondent, and despite section 4665 of the North Carolina Code expressly limiting such period of suspension to five years.

44. The Court erred in holding that, although the period of time under which the petitioner was to remain of good behavior and keep the conditions of the suspension of sentence had expired, the petitioner was still under charge of crime. Respondent concedes that the Buncombe County judge had no right to extend the period of suspension of sentence.

45. The Court erred in holding that petitioner could not go outside the record in a hearing on Habeas Corpus for the purpose of showing that extradition was not sought in good faith, despite the ruling in the case of Johnson vs. Zerbst 304 U. S. 458.

46. The Court erred in holding that petitioner, on Habeas Corpus, must confine himself solely to the matters considered on extradition.

47. The Court erred in holding that petitioner had no right to offer evidence from two judges of the asylum state, who refused to issue a warrant of arrest for petitioner as to their reasons for so refusing, although their refusal came after the District Attorney's office had refused to honor a request for a warrant of arrest, said refusal being based on the fact that the person sought was not charged with any violation of law subsequent to suspension of sentence.

48. The Court erred in holding that petitioner could not go outside the record to show that his extradition was sought for private purposes, although the judge who issued the capias for petitioner's arrest, had formerly been his prosecutor and had exchanged courts with the judge of Buncombe County Court, just prior to the issuance of capias for defendant's arrest, by the former prosecutor, now judge.

49. The Court erred in holding that the search and seizure of petitioner's private correspondence and files in an effort to secure information against petitioner, without issuance of a search warrant and without justification of a sworn affidavit, was no concern of the court on Habeas Corpus. The judge of Buncombe County admits in his deposition, signing such an order and also looking at the files.

50. The Court erred in holding that any testimony of the demanding state's prosecutor, or any others, tending to show that the petitioner had been consistenly of good behavior during his probation, as defined by law, was irrelevant.

51. The Court erred in holding that petitioner was a fugitive from justice, although petitioner had not concealed himself and came to the District of Columbia voluntarily to accept service of a subpoena of a congressional committee.

52. The court erred in holding that one arrested in the United States Capitol after appearing there in response to a subpoena by a congressional committee, is not immune from such arrest and is not entitled to relief on Habeas Corpus.

SUMMARY OF ARGUMENT.

Appellant respectfully submits that the numerous Assignments of Error in the Transcript of Record on this Appeal, which are relied upon, are substantially contained in the following points:

1.

It is a violation of the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States and a monstrous infringement of appel-

lant's civil liberties for his prosecutor, who afterward becomes judge, to issue a capias, of his own volition, for the arrest of one previously prosecuted by him, without any showing of breach of condition of suspended sentence, and the Trial Judge below, on Habeas Corpus, abused his discretion by discharging the writ in such circumstances.

2.

There was no substantial evidence in the record to sustain the order of removal and the order discharging the writ.

3.

The court below erred in rejecting appellant's requested findings of fact and in making its finding that appellant was a Fugitive from the justice of North Carolina.

4.

The findings of fact do not support the conclusions of law.

5.

There is no substantial evidence to support the finding of the court below that appellant was a Fugitive from the justice of North Carolina.

6.

The time of suspension of appellant's sentence having expired, he cannot be extradited to the State of North Carolina.

7.

Appellant is not subject to be extradited to North Carolina on a "Continued Prayer for Judgment" on count two, five years after he has paid an alternative penalty on count one.

8.

The indictment attached to the extradition papers is a legal nullity so far as these proceedings are concerned because, as shown by the extradition papers, appellant has already been tried on that indictment, sentenced thereon in the alternative, with an election given to appellant to choose which penalty he would accept. Appellant having satisfied one of the two alternative penalties by the payment of $1,000 fine and costs, to hold that appellant is now substantially charged with crime in North Carolina and may again be placed in jeopardy by having another and additional sentence imposed upon him under the same indictment, is a contemptuous disregard of the fundamental principles of law and the constitutional rights of appellant.

9.

One whose sentence has been suspended upon the payment of a fine may not be extradited from the District of Columbia, without the filing of any affidavit or other legal foundation showing a violation of the terms of suspension of sentence, it being agreed by both parties hereto that appellant was not on probation or parole and was not required to remain in the State of North Carolina.

10.

The lower court erred in ruling that questions of the lack of good faith, or of lack of jurisdiction in the court of the demanding state, may only be raised in the court of the demanding state, because the courts of the asylum state are limited to a scrutiny of the extradition papers alone.

ARGUMENT.

I, II, III, IV, V.

Appellant was not Charged With Any Existing Crime in the State of North Carolina; and was no Longer Subject to the Jurisdiction of Its Court and the Proceedings by Which Capias for Appellant's Arrest was Issued are a Violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution.

The capias for appellant's arrest, upon which these proceedings are based, was issued by a judge who is the same gentleman who prosecuted appellant. This former prosecutor, now a judge, was barred by all rules of law and ethics from taking any action in a case which he had personally prosecuted. He admits that the capias was issued by him, of his own volition (R. 229); that he had no knowledge of what appellant had been doing (R. 228), and that no one had requested the issuance of a capias for the arrest of appellant (R. 225), and that he did not confer with the present prosecutor of the Judicial District before issuing the capias (R. 229). Such an abuse of judicial discretion is in violation of all principles of honesty and legality.

No foreign dictator was ever more arrogant than the aforementioned Judge Nettles, for the learned gentleman violated every precept of moral and legal decency by his actions in this case, placing the court of Buncombe County, North Carolina, in a position where it may be held up to the scorn and derision of all familiar with the details of this case.

The learned gentleman, in his excoriation of appellant (R. 259), proclaims to the world his love and admiration for the Constitution and the laws of the

United States. He then shows his contempt for both by attempting to take judicial action in a case which he had formerly prosecuted, finding it necessary to have himself transferred out of the judicial district to which he had been lawfully assigned into the Buncombe County Court, to accomplish his purpose.

Although Judge Nettles had taken it upon himself to order capias issued for appellant's arrest, he confesses (R. 222) " . . . I felt that I was disqualified to hear the matter, inasmuch as I had been the Solicitor at the time he was prosecuted."

This shining example of judicial restraint indicates his respect for the District Court of the United States for the District of Columbia when inquiry was made during the taking of his deposition as to where he got whatever information he had in his mind which he felt justified the issuance of the capias. He then answered (R. 232),

> "that rests in the bosom of the Court, brother; and you and no other power that I know of can make me divulge that information, unless I wanted to, but I have no disposition to hide anything that I know of in the matter."

This same judge, who issued the capias under the aforementioned circumstances, was *by law* assigned to a judicial circuit other than that embracing Buncombe County, but through some manner of political skullduggery, filled with lust and hatred for appellant, procured the approval of the Governor of North Carolina to a transfer of this Honorable Judge from the judicial district to which he had been lawfully assigned, to the one which embraces Buncombe County (R. 15). On October 19, 1939, three days after having himself switched into that court, he issued a capias for the man

whom he had formerly prosecuted, appellant herein, delivering at the same time a scathing denunciation of appellant.

This vicious, vitriolic denunciation and expression of personal hatred and contempt for appellant (R. 259), by this judge, is sufficient, in and of itself, to invalidate the capias for appellant's arrest without considering that the capias was issued without any affidavit of any misbehavior, legal or moral, on the part of appellant and for no offense whatsoever except that appellant's views and political beliefs are different from those of his former prosecutor, now judge.

On February 19, 1940, two days after expiration of the five year period of the suspension of appellant's sentence and continuance of prayer for judgment, this Judge Nettles signed an order, a certified copy of which is contained in the extradition papers (R. 20), which states that sentence is to be imposed upon appellant without a hearing, the said order (R. 19) reading

> " . . . *the undersigned judge issued a capias for the arrest of the said W. D. Pelley, to be brought before the court for the purpose of imposing sentence upon the said W .D. Pelley within the said period of five years.*"

It is obvious from the foregoing that the capias for appellant's arrest was issued without the slightest consideration of fundamental principles of simple justice. There can be no denying that appellant, by the terms of the aforementioned order, has been condemned without any hearing whatsoever.

Speaking of such an abuse of judicial power by a judge, the late Justice Cardozo, of the United States Supreme Court, in an opinion written by himself said;

"When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to Habeas Corpus to put an end to the restraint. It is beside the point to argue, as the government does, that in this case a hearing, if given, is likely to be futile because the judge has made it plain how his discretion will be exercised in that already he has cancelled the suspension on the strength of an *ex parte* showing. The *non sequitur* is obvious. The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender. Cf. Synder v. Mass., 291 U. S. 97, 116, 78 L. E. 694. *Judgment ceases to be judicial if there is condemnation in advance of trial.*" Escoe v. Zerbst, 295 U. S. 490 (decided 1935) 79 L. E. 1566.

"Due process implies a tribunal both impartial and mentally competent to afford a hearing." Jordan v. Mass., 225 U. S. 167, 176 (1912) 56 L. E. 1038.

"The law of the land, in the words of Daniel Webster, is a law which hears before it condemns."[1] "The essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice."[2]

"That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement.[3] Even before the 14th Amendment was adopted the Supreme Court had stated that it was a "great fundamental rule in the administration of justice . . . that every one shall have an opportunity of defending his rights before judgment is pronounced against him."[4]

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[1] *Powell* v. *Ala.*, 287 U. S. 45, 68 (1932).

[2] *Jacob* v. *Robts.*, 223 U. S. 261, 265 (1912).

[3] *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U. S. 189, 193 (1915).

[4] *Smith* v. *McCann*, 24 How. 398, 407 (1861).

"The necessity of due notice and an opportunity of being heard are among the immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."[1] "Judgment without notice and opportunity to be heard wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered."[2] "Notice and hearing are preliminary essentials to the passing of an enforceable judgment; they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

"the Writ of Habeas Corpus is a protection of the citizen from encroachment upon his liberty from any source . . . equally from the unauthorized acts of courts and judges as those of individuals." In re Bonner, 151 U. S. 242, 14 Sup. Ct. Rep. 323. 38 L. E. 149.

"A judgment, though pronounced by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judges, but upon the settled and invariable principles of justice." Baker v. State, 3 Ark. (3 Pike) 491. Citing State v. Harborne, 45 Atl. 432, 72 Conn. 607.

"It violates the 14th Amendment and deprives a defendant in a criminal case of due process of law, to subject his liberty or his property to the judgment of a court the charge of which has a direct, personal, substantial, pecuniary interest in reach-

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[1] *Powell* v. *Ala.*, 287 U. S. 45, 68 (1932).

[2] *Galpin* v. *Page*, 18 Wall. 350, 368, 369 (1874).

[3] *Powell* v. *Ala.*, 287 U. S. 45, 68 (1932); *Frank* v. *Mangum*, 237 U. S. 309, 340 (1915).

> ing a conclusion against him in his case." Tumey v. Ohio, 273 U. S. 510, 523, 531 (1927), 71 L. E. 749.

In the case of *Puccinelli* v. *U. S.*, 5 Fed. (2d) 6, the court stated:

> "We are not disposed to establish the precedent, for, in our opinion, it is better to say that this appellant should escape the full penalty which the court intended to impose than that the fate of every prisoner and the duration of every sentence should depend upon the recollection of the trial judge or the uncertainty of parole testimony for months and perhaps for years after the original sentence was pronounced and entered upon the records of the court. In the language of Mr. Justice Bradley, the court should not adopt a proceeding so questionable and hazardous. To do so is not to amend, but to create."

If it be so dangerous, as mentioned in the foregoing, for a prisoner's fate to depend upon the recollection of the Trial Judge, is it not much more prejudicial to base the decision that appellant is substantially charged with crime upon a paper issued without any legal excuse and, as shown by the record Exhibit "E" (R. 259), issued only because of the personal antagonism of the Buncombe County Judge.

There was no evidence whatsoever offered, either to the Chief Justice or to the justice of the lower court on the Habeas Corpus hearing, to justify any finding of either Fugitivity or Substantial Charge of Crime. A glance at the record indicates that the entire argument of counsel for the respondent is predicated upon the indictment and capias contained in the extradition papers. But, it is conceded that appellant has already been tried and sentenced under that indictment. The lower court appeared to feel that so long as an indict-

ment was contained in the extradition papers and that the judgment of the court, in sentencing on that indictment, contained a suspended sentence, even though appellant had complied with the terms of the suspension of sentence, he became, by the issuance of the capias, a Fugitive from justice.

The terms on which sentence was suspended are:

1. That appellant either pay the fine of $1,000 plus costs, or *go to jail.* It provided further that appellant must be and remain of good behavior for five (5) years and not publish any pamphlet relating to a stock transaction in the State of North Carolina during that period. The last condition is not connected with these proceedings, for no where in the lower court or before the Chief Justice was there any mention of any violation of that provision. The respondent's case is based entirely on the capias issued October 19th, 1939.

We now come to the question, what is there in the record which justifies the conclusion that appellant is a fugitive from the justice of North Carolina? In deciding this question it must first be shown that the court of Buncombe County had jurisdiction to issue a capias for appellant's arrest. The Supreme Court of North Carolina has said that the courts of that state are without power to punish any person under a suspended sentence *Unless There is First Lodged Against That Person a Charge of a Violation of the North Carolina Criminal Law.*

It is a universal rule of law that a criminal charge, either by way of information or indictment, must be based upon a sworn statement. Not only is the record wholly devoid of any affidavit alleging a violation of the criminal law of North Carolina against appellant since his sentence was suspended but, *no criminal*

charge, either with or without an affidavit, has been filed against him since that time.

The rule of law, so well known as not to require repeating here, is that no man may be extradited unless the request for extradition is based upon either an affidavit or an indictment. The indictment mentioned in these proceedings has already been disposed of by appellant's going to trial on that indictment.

The lower court based its finding that appellant was a fugitive from the justice of North Carolina (R. 172) on the fact that there had once been an indictment against appellant and that since the time of that indictment appellant had left the state, disregarding the fact that, before appellant left the state, he had gone to trial on that indictment, had been sentenced in the alternative, had complied with one of these alternatives and upon being released was not required to remain in the state.

It is admitted that appellant complied with the terms of his suspended sentence by paying the fine (R. 173) and (The lower court speaking) (R. 173)

> "* * * it is admitted that he has performed on good behavior."

Thus we find appellant declared to be a fugitive under the terms of a suspended sentence where it is conceded that appellant has not breached any condition attached to the suspension of sentence. The lower court found as a fact (R. 209 - 9 & 10.):

> "9. Since the conviction mentioned in these Findings petitioner has not been charged in the court in which said conviction was had, nor in any other court, Federal or state, in the state of North Carolina, with the violation of any law of that state or of the United States."

> "10. The issuance of said capias was not based upon any affidavit filed in the cause in which said capias was issued, nor upon any affidavit submitted to the judge who issued said capias."

Appellant testified at the Habeas Corpus hearing that he read about the issuance of the capias while in Cincinnati, Ohio, several days after the capias had been issued (R. 50). One of the reasons upon which the lower court based its conclusion that appellant was a fugitive from justice is stated in paragraph 5 of the court's Findings of Fact (R. 208);

> "At the time of the issuance of the capias set forth in Finding 4, petitioner was absent from the State of North Carolina. He learned of the fact that the said capias had been issued within a day or two thereafter, and since that time has been absent from the State of North Carolina."

Evidently the lower court considered appellant's reading about the issuance of the capias "substituted service of process by publication" for as stated in the finding, appellant since that time has been absent from the State of North Carolina.

A scrutiny of the Findings of Fact (R. 208-9) indicates that appellant cannot, by any stretch of the imagination, be considered a fugitive. The Findings are substantially these:

> 1. Appellant convicted on two counts of a 16 count indictment January 22, 1935.
>
> 2. February 18, 1935, appellant on the first count sentenced to prison at hard labor for not less than one nor more than two years. Sentence suspended for a period of five years on certain con-

ditions. Second count, prayer for judgment continued for five years.

3. Fine of $1,000, imposed as condition of suspension of sentence, paid by appellant. Also the costs of the case which it is conceded (R. 97) were almost $800.00 and that payment of the costs also was a condition of the suspension.

4. On October 19, 1939, capias issued for appellant's arrest.

5. Appellant learned capias had been issued a day or two thereafter and had since that time been absent from the State of North Carolina.

6. Chief Justice Wheat found appellant to be substantially charged with crime and a fugitive from justice and ordered his return.

7. Appellant is a fugitive from justice "from or about" the time of issuance of capias.

8. Appellant is same person named in requisition papers.

9. Since the time of conviction no charge of violation of any law, Federal or state, or of North Carolina against appellant.

10. Capias for appellant's arrest "not based upon any affidavit filed in the cause nor submitted to the judge who issued said capias."

Inasmuch as the judgment (R. 13) did not require appellant to remain in the state or to report back to the state, it is hard to conceive by what process of reasoning appellant could be said to be either charged with crime or a fugitive from justice.

Can it be said that a suspended sentence is like Damocles Sword hanging by a hair over the head of a man, liable to fall at any moment regardless of his behavior?

Can it be said that there is placed in the hands of any judge the power of a despot to act or not to act at his own whim or caprice?

Is a capias, issued under the circumstances in this case, without any reason whatsoever for its issuance, of such all-powerful force, such a legal juggernaut that it crushes out all rules of law and renders helpless the tribunals of the asylum state.

Does the issuance of such a capias set at naught all of the judicial machinery of the asylum state and force the return of any man, despite the supposed protection of the God-given privilege of Habeas Corpus?

Do the rules of law and of evidence restrict the scope of a Habeas Corpus inquiry so as to defeat the very purpose for which it was born? Is this supposed protection to the dearest of all man's possessions, his liberty, a legal nullity and a farce?

The lower court ruled in this case that all matters outside the actual record, such as good behavior, etc., all of which concern the legality of the issuance of the capias which demands appellant's return, must be presented to the court of the demanding state because of the limitations upon the scope of judicial inquiry and thus answered all of the foregoing questions in the affirmative (R. 107).

According to the ruling of the lower court the issuance of capias for appellant, by the judge in the Buncombe County Court, when the appellant was in the State of Ohio, where he had a lawful right to be, changed the status of the appellant from a free man

to a fugitive from justice and all evidence going to show that the capias was a legal nullity must be presented in the Buncombe County Court. Following this reasoning, if appellant, in the farthest corner of the earth when the capias was issued, traveled back to Buncombe County and had the capias quashed for any reason whatsoever, there is nothing to prevent the judge in the Buncombe County Court from issuing another capias for appellant, with the consequent duty upon appellant to travel back to Buncombe County again *ad infinitum*, for, according to the lower court, the issuance of a capias magically and automatically makes appellant a fugitive from justice.

VI.

The Time of Suspension of Appellant's Sentence Having Expired, He Cannot be Extradited to the State of North Carolina.

The term of appellant's suspended sentence expired February 17, 1940 (R. 127). The order signed by Judge Nettles (R. 20) extending appellant's five year suspension of sentence for another five years, was signed in the February, 1940, term of the Buncombe County Court. The February term began the third Monday of February, 1940, which was the 19th (R. 122).

This order signed two days after the expiration of appellant's suspension of sentence, in addition to the provision previously mentioned herein, whereby appellant has been condemned without a hearing (R. 19), also contains another provision (R. 20) whereby the court adds another five year period of suspension of sentence to the five year period which had expired two days before.

Such action is expressly forbidden by the Code of Criminal Procedure of the State of North Carolina, Sec. 4665, reading as follows:

> "Termination of Probation, Arrest, Subsequent Disposition:
>
> The period of probation or suspension of sentence *shall not exceed a period of five years* and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time *within the above limit.*"

It may thus be seen that this gentleman, who issued the capias for appellant's arrest, realized the total lack of legality of the capias and that the issuance of the capias did not affect the running of the five year period of suspension of sentence, for if the running of that period was arrested by the issuance of the capias, of course it would not have been necessary for this judge to attempt the illegal extension of the period of suspension. Counsel for the respondent attempted to justify this illegal extension of the period of suspension and commenting on their argument, the lower court (R. 134) said "according to your construction it could be continued forever, continuing as long as the man lives." Later on in the proceedings counsel for the respondent admitted that the extension of the five year period of suspension of sentence is a legal nullity and that the judge, in attempting to extend the period, had overstepped legal bounds. Counsel for respondent stated that the order of extension "was useless" (R. 137), and "that it is unfortunate that the order of February was issued" and that they (R. 156) "are relying on the capias entirely." As a consequence, respondent's argument,

that appellant is still under a suspended sentence in North Carolina, must be based exclusively on the question of whether or not the issuance of the capias of October 19, 1939, stayed the running of the five year period and if it did, is the said capias a legal basis for the extradition of appellant?

U. S. v. *Wilson*, 46 Fed. 748 (1891) holds the rule to be:

> "The indefinite suspension of a sentence has been held a condonation of the offense and an exercise of pardoning power beyond the power of a court."

VII.

Appellant is not Subject to be Extradited to North Carolina on a "Continued Prayer for Judgment" on Count Two, Five Years After He Has Paid an Alternative Penalty on Count One.

The judgment (R. 13) states (R. 15);

> "3. It appearing to the Court that the costs of the whole case having been assessed in the judgment heretofore entered against the defendant, William Dudley Pelley, there is no cost adjudged against the defendant, Summerville."

Prayer for judgment on count two was continued for five years from that date, February 18, 1935. A continued prayer for judgment is synonymous with a suspension of imposition of sentence. Counsel for the respondent have maintained throughout this case that, the prayer for judgment having been continued for five years, the Buncombe County Court has the right,

at any time within the five year period, without giving any reason for so doing, to bring the defendant in and punish him under that prayer for judgment.

It is elemental law that a court may impose or suspend judgment on all counts, or any counts, of an indictment, but no court has the right to impose sentence at different times on different counts for offenses contained in one indictment, tried by one jury, unless it be to lessen the sentence. No student of constitutional law will argue otherwise.

The court in imposing sentence upon appellant, in its judgment, used the words (R. 14);

"The judgment of the court is . . . ."

"The term "judgment", when used in speaking of the judgment rendered against defendant in criminal proceedings, means the proceeding of declaring the defendant's punishment."

Bugbee v. *Boyce*, 35 Atl. 330, 68 Vt. 311.

The extradition papers state that appellant is a fugitive from justice. The lower court concluded him to be a fugitive. The term "fugitive from justice" implies that there is some penalty or debt owed by appellant to the courts of justice of North Carolina. Now, unless the North Carolina court has the right to punish appellant further, then there is no purpose in ordering him to return to that state where no action can be taken against him.

We can look to the Supreme Court of the State of North Carolina for an interpretation of its laws regulating the power of the North Carolina courts to punish under such circumstances. The Supreme Court of North Carolina has stated in a similar case that what the Buncombe County Court is attempting to do

in these proceedings is unlawful. *State* v. *Crook,* 115 N. C. 760, 20 S. E. 513:

> "It is familiar judgment that a Court has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count at a subsequent term, superadding imprisonment." * * *
>
> "It is familiar learning that a court may suspend the judgment of a criminal *in toto* until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count after a subsequent term, or by imposing a fine and at a later term superadding an imprisonment."

Citing *State* v. *Ray,* 50 Iowa 520; *State* v. *Miller,* 6, Baxter, Tenn. 513; *State* v. *Watson,* 8 S. W. 383, 95 Missouri 411; *People* v. *Felix,* 45 Cow. 163; *Thurman* v. *State,* 54 Ark. 120; *Wharton's Criminal Pleadings and Practice,* Sec. 913; *Witney* v. *State,* 6 Tenn. 247.

"There can be only one judgment upon the indictment; and this must be strictly and exclusively upon the particular count or counts upon which the defendant has been found guilty. It is a necessary consequence from this principle, that a judgment rendered and sentence awarded in pursuance thereof, definitively and conclusively disposes of the whole indictment." Edgerton v. Commonwealth, 5 Allen 514 (1862), Commonwealth v. Bennett, 2 Va. Cas. 235. Commonwealth v. Foster, 122 Mass. Rep. (1877) 317.

> "That there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitively and conclusively disposed of the whole indictment, and operated as an acquittal upon, or discontinuance of the other count. And the same view has been affirmed by decisions in other states. Guenther v. People, 24 N. Y. 100; Girtz v. Commonwealth, 22 Penn. St., 351; Weinzorpflin v. State, 7 Black 186; Stoltz v. People, 4 Scam. 168; State v. Hill, 30 Wis. 416; Kirk v. Commonwealth, 9 Leigh 627; Nabors v. State, 6 Ala. 700; Morris v. State, 8 Sm. and Marsh 762."
>
> "But after the defendant had been imprisoned under it, (the sentence) and the term had been adjourned without day, the court could not amend it, or set it aside and impose a new sentence instead. Rex v. Fletcher, Rus. and Ry. 58; Brown v. Rice, 57 Me., 55; Commonwealth v. May Loy, 57 Penn. State, 291."

The Supreme Court of the United States says:

> "A second judgment on the same verdict is void for want of power and affords no authority to hold appellant a prisoner."
>
> *Ex Parte Lange,* 18. Wall. 163.

The lower court found as a fact (R. 173) that appellant had complied with the conditions;

> " . . . it is admitted that he (appellant) has performed some of those conditions such as paying the fine, and it is admitted that he has performed on good behavior."

The court (R. 209) found as a fact that appellant had never been charged, since his sentence was suspended, with any violation of either state or Federal law and also found as a fact that no affidavit, alleging any such violation, was made.

The following decision of the Supreme Court of North Carolina should clearly indicate that appellant is entitled to his release. *State* v. *Hardin,* 112 Southeastern 593; *State* v. *Everett,* 164 N. C. 399:

> "Where a judgment in a criminal case has been suspended on condition of payment of costs and good behavior, the term "good behavior", by correct interpretation, means such conduct as is authorized by law of the state. In other words, a violation of some criminal law of the state must be made to appear before a defendant can be held to have violated the terms of such suspended judgment.
>
> "In order to be a valid sentence on such suspended judgment, it must be properly established by pertinent testimony that the conditions have been broken within the meaning and purpose of the above principle."

State v. *Everett,* 164 N. C. 399.

> "This power of the Court to suspend judgment upon terms should not be exercised so as to prejudice or embarrass the defendant's rights to review the judgment and proceedings of the Court upon which it is based, by appeal, if he elects to do so." (Violation of due process of law.)

State v. *John Gooding,* N. C. Rep. 194 N. C. 271, 134 S. E. 436 (September, 1927). Stacy, C. J., after stating the case:

> "There are several reasons why the judgment in this case, from which the defendant appeals, cannot be sustained."
>
> "In the first place, the only thing definite and certain about the judgment entered in the September Term, 1925, is the fine of $150 and costs. If the defendant were not entitled to be discharged upon the payment of this fine and costs, which he may

have been, it is clear that under the next sentence, "prayer for judgment continued for 12 months," no judgment could be entered after the lapse of one year, or 12 months, which expired September, 1926, therefore, the judgment rendered in the March Term, 1927, is without warrant of law and must be held for naught." S. v. Hilton, 151 N. C. 687.

"In the next place, if the case were not off the docket in the March Term, 1927, it may be doubted as to whether the finding that 'the condition upon which the prayer was continued has been violated', without knowledge, is sufficient to warrant the imposition of a road sentence. In S. v. Hardin, 183 N. C. 815, it was said that where judgment in a criminal prosecution has been suspended on condition that the defendant pay costs and remain of good behavior, the term 'good behavior', by correct interpretation, means such conduct as is authorized by the law of the State. *In other words, the violation of some criminal law of the State must be made to appear before a defendant can be held to have violated the terms of such suspended judgment.*" (Italics ours)

The Supreme Court of the State of Georgia comments as follows upon the action of a Trial Judge in attempting to punish one under a suspended sentence for actions which the judge thought were not "good behavior":

"On the trial of that case the evidence did not authorize a conviction, and the recorder discharged the defendant; but apparently he was of the opinion that the evidence showed that the defendant's behavior was not good, and he accordingly directed the marshal to enforce the sentence in the former case. In other words the court seems to have convicted him of bad behavior, which was not an offense with which he was charged, or for which he was or could have been tried. Being thus of the opinion that the defendant's good behavior had

> ceased, the recorder withdrew an indefinite suspension of the right to collect the additional $400 mentioned in the original sentence. The defendant may or may not have been exercising 'good behavior'. But there is no law authorizing such a proceeding, or the enforcement of the collection of the additional $400 by imprisonment. Judgment reversed. All the justices concur."

Gordon v. *Johnson,* 126 Georgia Rep. 584 (1906) (Ga. Sup. Ct.) Habeas Corpus.

The logical inference to be drawn from respondent's argument is that the Buncombe County Court can impose a fine, suspend a prison sentence and then suspend the imposition of sentence and not take any action in the case until years after appellant's time for taking an appeal has expired. This court can never sustain any such position.

It is conceded (R. 97 & 98) that the costs of court, which appellant paid, were a little less than eight hundred dollars. Appellant was convicted on but two counts. Obviously, he was not liable for the expenses of prosecuting him on fourteen counts upon which he had been acquitted. Nevertheless, he paid the entire cost of the proceeding, including the stenographer's bill. He paid between seven and eight hundred dollars on two counts upon which he was liable for costs, leaving an admitted penalty of between three and four hundred dollars on each of the two counts upon which he had been convicted. Having paid a monetary penalty on each of the two counts, the court is powerless to enforce any new and additional punishment upon either count, by reason of the Fifth and Seventh and Fourteenth Amendments to the Constitution of the United States, and it was so held by the Supreme Court of North Carolina in an opinion reading in part as follows:

"Without adverting to the unusual exercise of judicial power, employed, not to repress crime, but to reform the moral habits of the convicted party; and without questioning the right of the court, during a term, to correct, modify or recall an unexecuted judgment in a criminal, as well as in a civil case, *it is manifest the defendant has undergone a portion, though an inconsiderable part, of his sentence, and has paid, as costs, a sum for which he was not liable*, and the payment of which must be deemed a pecuniary fine, thus measured and ascertained. When punishment has thus been imposed and suffered, in whole or in part, can it be treated as a nullity so as to expose the offender to be again sentence as if he had not been before, by vacating the judgment under which it was inflicted?"

"There must be restraint upon judicial authority over judgments rendered during the term, in such cases, or the fundamental maxim nemo debet bis puniri pro uno delicto would be violated. Let us suppose a judgment for corporal punishment, such as formerly might here be rendered, and its prompt and full execution during a term, can the sentence be set aside and all done under it annulled? The stripes upon the person, or the painful pressure of the stocks or pillory, with their attending humiliation, could not be effaced; nor could the officers that carry the sentence into effect be thus exposed to an action for assault and false imprisonment, at the instance of those who suffered by an order vacating the judgment." *State* v. *Drury Warren*, 92 N. C. Rep. 825, 827. *Puccinelli* v. *U. S.*, 5 Fed. (2nd) 6 (*supra*).

"Head Note: Sentences imposed on verdicts, or pleas of guilty, or pleas of guilty on several indictments, or on several counts of same indictment, in the same court, *run concurrently*, in absence of specific provision that sentences shall run consec-

utively, specifying order of sequence. Citing *U. S.* v. *Patterson*, 29 F. 775; *Dougherty* v. *U. S.* 2 Fed. (2nd) 691."

Further, inasmuch as appellant has been punished on both counts by paying a fine and costs of the entire proceeding, the conditions of suspension of sentence which attached to count one also attach to count two, for nowhere in the judgment is there a provision that the conditions attaching to each count are not concurrent.

Buessel v. *U. S.* (258 Fed. Rep. 811)

"If it does not affirmatively appear that the court, in imposing sentence, directed that the sentences were to run successively we need not assume that such a direction was given; and, if it was not given, the invalidity of the third count if it be invalid, would not justify a reversal, for unless the court imposing sentence under each of several counts, does not direct that imprisonment under one count is not to run concurrently with imprisonment under the others, the punishments under all the counts are executed simultaneously, and the fact that one of the counts is defective does not entitle a defendant to a release from imprisonment. *Reg.* v. *King*, (1897) 18 Cox C. C. 447; in re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; in re Jackson, 3 Mac Arthur, (D. C.) 24."

And to the same effect:

"Defendant convicted of selling narcotics in violation of Act, Dec. 17, 1914, Sec. 2 (Comp. St. Sec. 6287h), under indictment containing three counts, sentenced to confinement "for the term of five years on each of said counts and until he shall

have been discharged from said penitentiary by due process of law, said term of imprisonment to run consecutively, and not concurrently," was not sentenced for 15 years, 5 years, the maximum provided in section 9, on each count, but the sentences in such case were to run concurrently, and not consecutively, in view of failure to designate order of sequence."

Criminal Law—Key 1216 (2)—"Sentences on several counts, or on indictments consolidated for trial, run concurrently, in absence of provision specifying order of sequence."

"Cumulative sentences are permissible, and in some cases appropriate; but sentences imposed on verdict of guilty, or pleas of guilty on several counts, or on several indictments consolidated for trial, run concurrently, in absence of specific and definite provision therein that they be made to run consecutively by specifying order of sequence."

Dougherty v. *U. S.*, 2 Fed. (2d) 691.

Respondent contends that the right to sentence on count two is an absolute one, not in any way connected with the conditions attaching to suspension of sentence on count one. Appellant was given his choice to either pay $1,000 fine plus costs or serve one to two years at hard labor.

Does counsel for respondent contend that if appellant had elected the jail sentence the court could now call him in to impose an additional punishment upon appellant? The proposition is so absurd that but little consideration need be devoted to it.

VIII.

One Having Been Sentenced Under a Valid Indictment With the Alternative, to Either Pay a Fine or go to the Penitentiary, Having Elected the Monetary Penalty, May Not, Five Years Later, be Sentenced on Any Count in That Indictment.

There is no disagreement between the parties hereto that appellant paid $1,000 fine on the first count upon which he was convicted and costs amounting to a little less than eight hundred dollars for the whole case. The action of the lower court in such circumstances holding that appellant is still subject to punishment in North Carolina, as he obviously must be to be a fugitive therefrom, was gross error and a violation prohibited by the Common Law, the Constitution and Bill of Rights. The indictment contained in the extradtion papers, it is agreed, is the same indictment upon which appellant was tried and paid the aforementioned monetary penalty. The following cases are cited without comment to show the palpable error of the lower court in ruling that appellant was still subject to further punishment in North Carolina:

The Supreme Court of the United States spoke as follows in Ex parte Lange, 18 Wall. Rep. p. 163, the outstanding case on the subject:

> "The provisions of the common law and of the Federal Constitution, that no man shall be twice placed in jeopardy of life or limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor."
>
> "Hence, when a court has imposed fine and imprisonment, *where the statute only conferred power to punish by fine or imprisonment, and the* fine has been paid, it cannot, even during the same

term, modify the judgment by imposing imprisonment instead of the former sentence."

Head Note: "The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end."

"A second judgment on the same verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged."

And further in the same opinion:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

"The principle finds expression in more than one form in the maxims of common law. In civil cases the doctrine is expressed by the maxim that no man shall be vexed for one and the same cause.

"Blackstone in his Commentaries, cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed."

"Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person

shall be twice punished for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial."

"The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

"Hence, to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of autrefois acquit or autrefois convict is a good defense."

And further in the same opinion:

"It is very clearly the spirit of the instrument to prevent a second punishment of judicial proceedings for the same crime, so far as the common law gave that protection."

"In the case of The Commonwealth v. Olds, one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky remarked, "that every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law, as well as Magna Charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of autrefois acquit and autrefois convict. To perpetuate this wise rule, so favorable

and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question."

And further in the same opinion:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?"

"The argument seems to us irresistable, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Further:

"The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States, and he having also under-

gone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

And further in the same opinion:

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in

> such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged."
>
> Ex Parte *Lange*, 18 Wall. 163.

The foregoing is concerned with an attempt to vacate a sentence and substitute another therefore but the case with which we are here concerned is a delibrate attempt to add another sentence to one previously imposed.

IX.

One Whose Sentence Has Been Suspended Upon the Payment of a Fine May Not be Extradited From the District of Columbia, Without the Filing of Any Affidavit or Other Legal Foundation Showing a Violation of the Terms of Suspension of Sentence, It Being Agreed by Both Parties Hereto That Appellant was not on Probation or Parole and was not required to remain in the State of North Carolina.

The lower court found as a fact that no affidavit of any kind had been submitted to the judge who issued capias for appellant's arrest. His conclusion that appellant is a fugitive from justice is based (R. 208-209) on the fact that appellant was absent from the state at the time capias for his arrest was issued. We will restrict ourselves at this time to a consideration of the validity of an order for removal based on a capias issued without an affidavit of any kind to support it.

The lower court ruled (R. 172) that the issuance of the capias of October 19, 1939, without any affidavit or other legal basis for its issuance automatically constituted appellant a fugitive from justice because appellant was not in the State of North Carolina at the time the capias was issued. All this, despite the fact that the judgment (R. 13) imposed upon appellant did not require him to remain in the State of North Carolina and permitted him to go any place in the world he desired. The said judgment placed no requirement upon the appellant that he report to any agency of the court of Buncombe County or of the State of North Carolina. Appellant was not placed on probation nor was he on parole. Appellant contended in the lower court that before he could become a fugitive he must, of necessity, be shown to have violated the terms of his suspended sentence, but the lower court ruled that all such matters must be taken up in the court of the demanding state. Concerning the contention of appellant the lower court states (R. 173).

> "now on the question of the first count upon which judgment was imposed and execution suspended, it is admitted that he has performed some of those conditions, such as paying the fine, and it is admitted that he has performed on good behavior. That raises a question of fact as a defense in the trial court. It is not a matter which I can consider here."

The Supreme Court of the State of North Carolina has ruled that, before a capias may issue for the arrest of one under a suspended sentence, there must be *a charge of a violation of the criminal law of North Carolina.*

State v. *Hardin*, 112 Southeastern 593; (*Supra*)
State v. *Everett*, 164 N. C. 399; (*Supra*)
State v. *Gooding*, 194 N. C. 271 (1927), (*Supra*)

Innumerable decisions of the United States Supreme Court, the Federal and the State Courts of Appeal have held that no man could be deprived of his liberty and removed to another state upon vague and unsatisfactory affidavits or upon affidavits based upon information and belief. Yet in this case, wherein the return of appellant to the state of North Carolina is sought, no affidavit of any kind has been submitted (Findings of Fact, R. 209) to the Chief Justice of the District Court, who acted in these proceedings as a Governor. The condition precedent to the obligation to surrender is that the authorities shall be apprised of the existence of facts upon which the duty depends. Yet the judge who issued the capias in North Carolina for the arrest of appellant states (R. 232)

> "that no power I know of could make me divulge that information unless I wanted to";

that he did not know what appellant had been doing (R. 228) and that the capias was issued by him (R. 229)

> "without the request, or at the behest of anyone",

and that the Solicitor of Buncombe County (R. 229) was not consulted in the matter.

The proposition that an affidavit on information and belief, no matter how strongly worded, is insufficient to justify interstate extradition is so ingrained into the judicial interpretations of extradition law that the following cases are cited without comment;

As strongly worded as these opinions are it will be noticed that they, at least, refer to a sworn statement, whereas, in appellant's case, as shown by the Findings of Fact, not even an affidavit has been filed.

Affidavit—certainty.

"The affidavit, when this form of evidence is adopted, must be so explicit and certain that if it were laid before a magistrate it would justify him in committing the accused to answer the charge."

Authenticated copy of indictment—affidavit.

"The representations of the executive of the demanding state are of no effect unless supported by a duly authenticated copy of an indictment found or an affidavit made."

Strict compliance with Act of Congress.

"The Act of Congress provides for a method that is summary in its effect, and must therefore be strictly complied with."

Affidavit on belief or information—sufficiency.

"The affidavit must be certain and absolute, and it is not sufficient if founded on belief or information."

Ex Parte Morgan, 20 Fed. Rep. 298, 300.

Head Note.

"A fugitive from justice is 'charged' with a crime, within the extradition law, only when he is charged lawfully by a person who has *knowledge* of its commission, or is possessed of information, which he state under oath, leading to a reasonable and fair mind to infer its commission."

Head Note.

"An affidavit made before an officer in another state, charging relator on information and belief with a felony committed in that state, without stating the grounds of affiant's belief or the sources of his information, was insufficient to sustain a war-

rant for relator's arrest in New York in extradition proceedings."

People ex rel, Cornett v. *Warden of City Prison of Brooklyn,* 112 N. Y., Sup. 492 (Sup. Ct. of N. Y. 1908).

The late Justice Cardozo of the Supreme Court of the United States, when a member of the Court of Appeals of the State of New York, concurred in the following wherein the opinion, among other things, said:

" . . . when extradition is sought on the basis of an affidavit, there is need for closer scrutiny (than when based on an indictment). The affidavits in this case, when read together, are seen to proceed upon information and belief, though one of them, if read alone, suggests a profession of knowledge that is erroneous and unwarranted. The charges are vague, indefinite and general. They are made without specification of the sources of information on the grounds of belief. If they are accepted at their face value, they still omit a basic element of guilt, in that the prisoner, prosecuted as accessory after the fact is not stated to have had knowledge of the guilt of the principal offenders. There is room for argument that any one of these grounds of criticism, standing alone, would be inadequate. Our duty is to weigh them in their cumulative significance. We think the danger of a removal that is merely ignorant or wanton would be extended beyond precedent if affidavits so defective were to be accepted as a basis of extradition. Neither formally nor substantially is there a sufficient charge of crime." People ex rel. Di Martini v. McLaughlin, 243 N. Y. Rep. 417.

"An affidavit accompanying the requisition of the governor of another State, which states that the affiant 'has reason to believe, and does believe,'

that the accused embezzled, or fraudulently converted to his own use, certain personal property, is not the statement of fact, and is fatally defective, and is insufficient to support the issuance of a warrant of arrest as a fugitive from justice by the governor of this state."

"Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law; the most improbable stories may be believed of anyone, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man 300 miles off, who will swear that he has been informed and believes of his guilt."

"That such an affidavit is insufficient to support the issuance of a warrant under the laws of this state was held by this court in Ex Parte Dimmig, 74 Cal. 165. We there said: 'by a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath, that he is guilty of a crime.'" Ex Parte Spears, 88 Cal. Rep. 640.

Head Note.

"It is a condition precedent to the obligation to surrender that the executive of the State, upon whom the demand is made, be apprised of the facts upon which the duty depends."

Head Note.

"Where the demand is supported by an affidavit as authorized by the Act of Congress of 1793 (1 U. S. Stat. at Large, 302), no less degree of certainty is admissible than is required in an indict-

ment for the same offense. If any distinction exists, the affidavit should be more full and explicit; and the offense should be therein distinctly and plainly charged."

(*The People ex rel. Joab Lawrence* v. *John R. Brady One of the Justices of the Supreme Court of the State of New York, Respondent*, 56 N. Y. Rep. 182.

"The affidavit required in such cases should set forth the facts and circumstances relied on to prove the crime, under the oath or affirmation of some person familiar with them, whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the mere verification of a court paper by a public official, who makes no claim to personal information as to the subject matter of the same. Ex parte Smith, 3 McLean, 121, Fed. Case No. 12,968; in re Doo Woon, 18 Fed. 898; Ex parte Morgan, 20 Fed. 298. By requiring such an affidavit, the liberty of the citizen is, to a great extent, protected, and the executive upon whom the demand is made is thereby enabled to determine if there is cause to believe that a crime has been committed. To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of crime something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact." Ex Parte Hart, 63 Fed. Rep. 259.

A reading of the following cases clearly indicates the palpable error committed by the court below in restricting his judicial investigation in such manner as to prevent the appellant from showing, by competent evidence, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.

Ex parte Wernhause, 202 Missouri App. Rep. 245;
Illinois ex rel. McNichols v. *Pease,* 207 U. S. 100, 28 Sup. Ct. Rep. 38;
Hyatt v. *Corkran,* 188 Sup. Ct. Rep. 712.

Counsel for the respondent based its argument in the lower court, in great part, upon the case of *Drinkall* v. *Spiegel,* 68 Conn. 441, which concerned a defendant who was on parole and who violated his parole. Appellant herein was not on parole and there is an affirmative finding of fact by the court below that no charge of breaking parole or any other offense had been filed against him.

A glance at the following cases shows that the court committed grave error in denying appellant the opportunity to prove that he was not in fact a fugitive from justice within the meaning of the Constitution and laws of the United States:

Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250;
Ex parte Joseph Smith, 3 McLean, 121, 135, 136, Fed. Cas. No. 12,968;
Lawrence v. *Brady,* 56 N. Y. 182.

X.

The Lower Court Erred in Ruling That Questions of Good Faith, or Lack of Jurisdiction in the Court of the Demanding State, May Only be Raised in the Court of the Demanding State, Because the Courts of the Asylum State are Limited to a Scrutiny of the Papers Alone.

The lower Court ruled that it was without power to go behind the requisition of the governor and was confined to an inspection of the extradition papers (R. 74) and ruled that those matters were all within the Governor's discretion (R. 73). Such a rule could not possibly hold true in a case of such extraordinary circumstances as this one, wherein it is sought to extradite appellant upon the basis of a court order issued without any affidavit or other legal document. Here the former prosecutor of appellant took it upon himself to perform a judicial act in issuing a capias wholly unsupported by any facts. Certainly, in such highly irregular and suspicious circumstances surrounding the issuing of the capias, the question of good faith was intimately bound up with the question whether the extradition was sought for any bona fide purpose. The lower Court was not bound to perform an idle act and order the extradition of appellant to satisfy the political animosity of appellant's former prosecutor. The appellant proffered testimony (R. 312) by witnesses who were present at court, one of whom was a member of a committee whose chairman had publicly announced, prior to the issuance of capias for appellant's arrest, that he was going to North Carolina to have appellant's suspended sentence imposed upon him. This and all other testimony at the hearing tending to show an utter lack of good faith in the extradition proceeding, were rejected by the court below

under the erroneous impression that it was confined to a perusal of the extradition papers alone and was without power to consider the substance and regularity of the proceedings. The facts related here and previously in the argument demonstrate that there were no legally recognized facts to support the capias issued by Judge Nettles; hence the capias, which forms the sole foundation for the extradition proceeding, under both North Carolina and Federal Law is a nullity and the action of the Governor based solely upon the capias is likewise a nullity.

Ex parte Siebold, 100 U. S. 371.

> "The judgment of an inferior court affecting personal liberty is not so conclusive but that the question of its authority to try and imprison may be reviewed on Habeas Corpus by a superior court or a judge having power to award the writ."
>
> "*People ex rel Tweed* v. *Liscomb* 60 N. Y. 559, 572, 19 Am. Rep. 211.
>
> "When a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will upon Habeas Corpus, look into the record so far as to ascertain this fact, and, if it be found to be so, will discharge the prisoner. It is no answer to say the court had jurisdiction of the person of the prisoner, and of the offense, under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such a case."
>
> *Glucksman* v. *Henkel*, 221 U. S. 508, 31 Sup. Ct. Rep. 704.
>
> "Although a writ of Habeas Corpus cannot perform the functions of a writ of error, the court will go behind the committment to ascertain if

there was any legal evidence to give the commissioner jurisdiction, since he has no jurisdiction in the absence of some legal proof."

"One held for removal to another Federal district for trial is entitled to discharge on Habeas Corpus because of the exclusion of evidence that no offense triable in the District to which he was sought to be removed had been committed by him and on the theory that a certified copy of the indictment and proof of identity of the party accused furnished conclusive evidence of probable cause."

Tinsley v. *Treat*, 205 U. S. 20, 27 Sup. Ct. Rep. 430, 51 L. Ed. 689.
Kessler v. *Treat*, 205 U. S. 33, 27 Sup. Ct. Rep. 434.

CONCLUSION.

It is respectfully submitted that the record is wholly devoid of any showing that appellant is presently charged with crime in North Carolina or is now subject to the jurisdiction of its court; that appellant has entirely satisfied the sentence imposed by the North Carolina court under the indictment and that court is without power to impose a further, additional, or new sentence upon appellant; that the North Carolina court intended, at the time of the sentence of appellant, to abandon the power to sentence appellant under the second count of the indictment by continuing the prayer for sentence for five years from the date of the alternative sentence under the indictment; that, in any event, the continued prayer for judgment for five years under the second count is a nullity under the law of North Carolina, as construed and applied by its highest court, and affords no warrant in law to return peti-

tioner for the imposition of a further, additional or new sentence; that the highly irregular and unjudicial action of the former prosecutor of appellant in issuing a capias for the arrest of appellant, without any supporting affidavit of any person having personal knowledge of a violation of North Carolina law, or violation of any term of the sentence by appellant, which issuance of capias was a judicial action that could only be taken upon adequate legal and supporting foundation, is so violative of the basic concepts of due process of law that the Fifth and Fourteenth Amendments to the Federal Constitution are infringed; that the proceedings taken by the Governor are a nullity because they are based on no legally recognized foundation; that findings of fact 9 and 10 of the court below, namely, "Since the conviction mentioned in these Findings petitioner has not been charged in the court in which said conviction was had, nor in any other court, Federal or state, in the state of North Carolina, with the violation of any law of that state or of the United States", and "The issuance of said capias was not based upon any affidavit filed in the cause in which said capias was issued, nor upon any affidavit submitted to the judge who issued said capias", effectively show that there is no legal foundation for the extradition of appellant; that the lower court unduly restricted the permissible scope of the inquiry at the trial on the merits by arbitrarily refusing to admit and consider the proffered testimony of appellant relating to the good faith and substantiality of the extradition proceeding, as well as decisions construing and applying North Carolina law on the point of the further and present jurisdiction of its court over the person of appellant under the original sentence imposed in 1935; that the findings made

by the court below, considered in their entirety, afford no warrant for its conclusion that appellant is a fugitive substantially and presently charged with crime in North Carolina; that the proceedings of record constitute a violation of appellant's rights under the Eighth Amendment to the Federal Constitution and otherwise violate appellant's civil liberties under the Constitution in that the proceedings are an attempt to place him in double jeopardy; that the record shows without question that the supplementary proceedings in North Carolina violate every elementary view of fair play and justice and are wholly extra-legal in their force and effect; that each and every of the assignments of error are well founded in point of law; and that the court below erred in discharging the writ and dismissing the petition.

Respectfully submitted:

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No. 7734—Special Calendar

In the United States Court of Appeals for the District of Columbia

JANUARY TERM, 1941

WILLIAM D. PELLEY, APPELLANT

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal from an order of the District Court of the United States for the District of Columbia, discharging appellant's writ of *habeas corpus*, dismissing the petition upon which the writ was issued, and remanding appellant to the custody of the appellee.

The statement of facts contained in appellant's brief is inadequate to properly apprise this Court of the facts and circumstances which are essential to a proper understanding of the issues involved on this appeal. Appellee believes it appropriate, therefore, to restate the case.

Appellant was convicted on January 22, 1935, in the Superior Court of Buncombe County, North Carolina, on the first and second counts of a sixteen-count indictment. The first count charged appellant with the crime of selling, and causing to be sold, securities without registering as a dealer or salesman

as provided by law; the second charged appellant with unlawfully making false representations for the purpose of selling securities and stocks in the State of North Carolina (R. 8, 208, see supplemental record).

On February 18, 1935, the Court sentenced appellant, on the first count, to confinement in the State's prison for a period of not less than one nor more than two years. The execution of this sentence was suspended for a period of five years, upon agreement by the appellant to pay a fine of $1,000.00 and the costs of the criminal prosecution; and upon the conditions that he remain continuously of good behavior and that he not publish or distribute in North Carolina certain designated periodicals pertaining to the sale of corporate stock. With respect to the second count upon which appellant was convicted, prayer for judgment, that is, imposition of sentence, was continued for a period of five years (R. 9, 13–14, 18–20, 208).

On October 19, 1939, the Superior Court of Buncombe County, North Carolina, issued a *capias* for the apprehension of appellant; who, at that time, was, and has been since, outside of the jurisdiction (R. 208).

During the February 1940 Term of the Buncombe County Court, and after the issuance of the *capias*, an order was issued by that court, continuing in force for five years both the suspended sentence imposed under the first count of the indictment and the prayer for judgment under the second count. The order recited that the *capias* had been issued for the purpose of imposing sentence under count two and of determining whether the suspended sentence under the first count should be put into effect (R. 18).

On February 23, 1940, an application for requisition was filed with the Governor of North Carolina by the Solicitor of the 19th Judicial District of that State, requesting the extradition of appellant from the District of Columbia. Appended to the application was a certified copy of the indictment upon which appellant was tried and convicted (R. 208). The application set forth the facts substantially as related above and certified that in the opinion of the applicant "the ends of justice require the arrest and return of the accused to this State for sentence and judgment upon conviction for the

felony set forth in the Second Count in said Bill of Indictment, and for putting into effect the suspended sentence imposed on the First Count in said Bill of Indictment" (R. 9). The application further alleged that the applicant was advised and believed that appellant, while in the State of North Carolina, "committed various acts and engaged in conduct and practices which constituted a violation of his parole and probation and justified the imposition of judgment," the substance of which is there set forth in detail (R. 10).

On March 8, 1940, the Governor of North Carolina forwarded to the Chief Justice of the District Court of the United States for the District of Columbia requisition papers, properly authenticated, which included the *capias*, certified copies of the indictment upon which appellant was tried and convicted, and the above-described application (R. 12).

The Chief Justice, after a hearing on this requisition, found the appellant to be substantially charged with crime in the State of North Carolina and to be a fugitive from its justice. An order was issued surrendering him to the agent of that State (R. 22–24).

Appellant thereupon filed in the lower court a petition for writ of *habeas corpus*, seeking his release from custody. The petition alleged, as grounds for relief, that: (1) the requisition papers contained no statement of any crime committed in North Carolina; and did not specify any offense committed by the appellant which would justify the issuance of a *capias* by the County Court; (2) appellant was not under indictment nor charged with crime in North Carolina; (3) the affidavits in support of the requisition showed on their face that they were based upon information and belief; (4) appellant was not a fugitive from the State of North Carolina; (5) extradition was sought not to prosecute the appellant in good faith, but to serve a private purpose; and upon return to North Carolina he would be subjected to violent physical abuse and detained at a prohibitive bond which appellant would be unable to give; and (6) the sentence and suspension of sentence were illegal and unconstitutional (R. 2–6).

On April 5, 1940, the lower court, after hearing, dismissed the petition for writ of *habeas corpus* and remanded appel-

lant to the custody of the appellee for return to the State of North Carolina (R. 186). This appeal was thereupon taken (R. 210).

STATUTES INVOLVED

Article IV, Section 2, Clause 2, United States Constitution:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

Rev. Stat. § 5278, 18 U. S. C. § 662:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

Act of March 3, 1901, 31 Stat. 1340, D. C. Code (1929), tit. 6, § 377:

> In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the supreme court of the District of Columbia [now the District Court of the United States for the District of Columbia, 49 Stat. 1921] shall cause to be apprehended and delivered up such

fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections 5278 and 5279, title 66, of the Revised Statutes of the United States, and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

THE ISSUES INVOLVED

The many assignments of error and points relied upon by appellant on this appeal raise numerous questions wholly foreign to the issues properly before the Court. They therefore do not warrant specific answer. Appellee submits that the only questions germane to this appeal may be summarized and disposed of under the following points:

1. Whether appellant is substantially charged with crime in the State of North Carolina;
2. Whether appellant is a fugitive from the justice of North Carolina;
3. Whether the lower court erred in excluding evidence of malice and unlawful motive on behalf of the State of North Carolina in seeking appellant's return to that State.

SUMMARY OF ARGUMENT

I. In a *habeas corpus* proceeding to review the validity of an order of extradition, a court is limited in its inquiry to a determination of whether the petitioner is charged with crime in the demanding state, whether he is a fugitive from the justice of that state, and whether a demand in due form has been presented to the chief executive of the asylum state. All matters not related to these questions are irrelevant to the proceeding.

Appellant is charged with crime within the meaning of that term, as used in the Constitution and applicable statutes. The requisition papers contain a copy of an indictment, certified as authentic by the Governor of North Carolina. This alone is sufficient to satisfy constitutional and statutory requirements in a case of this character. It is uniformly held that one—who has been convicted in the demanding state and

granted parole or probation, and thereafter leaves that jurisdiction—has a continuing obligation to that state until the sentence imposed, or the conditions of the parole or probation, have been fully satisfied. Accordingly, until there has been full satisfaction of that obligation, he stands charged with the crime alleged in the original indictment upon which the conviction was obtained. Since the requisition papers in the present case contain an authenticated copy of an indictment charging appellant with crime in North Carolina, it follows that his return to that State cannot be challenged on that ground.

The many contentions advanced by appellant with respect to the validity of the judgment of conviction, the legality of the *capias* ordering appellant's arrest for the purpose of revoking probation and of imposing sentence, and the sufficiency of the affidavit supporting the application for extradition, which was filed with the Governor of North Carolina, are all matters not properly before the Court in a *habeas corpus* proceeding.

II. Appellant is a fugitive from the justice of North Carolina. While it may be conceded that appellant left that State lawfully and with the acquiescence of the North Carolina authorities, it does not follow that he is, as a result, not subject to extradition. This Court, in *Reed* v. *Colpoys,* 69 App. D. C. 163, 99 F. 2d 396, *cert. denied,* 305 U. S. 598, in disposing of this very question, held that one is a fugitive from justice within the purview of the Constitutional provision governing extradition who, having been charged with crime in the demanding state, leaves that state, no matter for what purpose or with what motive, nor under what belief. Thus, the appellant comes within the generally accepted rule that one who leaves a state pursuant to the provisions of parole or probation is, upon violation of that parole or probation, a fugitive from justice. Whether in the present case suspension of execution of sentence under count one and the continuance of the prayer for judgment under the second count have the effect of placing appellant on probation or parole is not material, for it is clear that appellant has not satisfied his obligation to the State of North Carolina.

III. The motive or purpose of North Carolina in seeking appellant's return is not open to inquiry on *habeas corpus.* It

is conclusively presumed that the authorities of the asylum state and of the demanding state proceed, in matters of extradition, with no evil purpose and with no other motive than to enforce the law. Consequently, whether appellant's return is sought for an ulterior and malicious purpose, or whether he is the victim of a politically inspired plan to obtain his presence in North Carolina for the purpose of subjecting him to maltreatment and undue punishment, are matters not germane to the present proceedings. The action of the lower court in excluding evidence offered to establish appellant's contention in this respect was entirely proper.

ARGUMENT

I

Appellant is substantially charged with crime in the State of North Carolina

The contentions principally urged by appellant on this appeal are that the requisition papers do not charge appellant with any crime against the laws of North Carolina; and that the issuance of the *capias* for appellant's arrest was unlawful and in violation of the due process clause of the Constitution. It is respectfully submitted that there is no merit to the first contention, and the second is not properly before the Court.

The requisition papers forwarded to the Chief Justice of the District Court of the United States for the District of Columbia in the present case contained a copy of an indictment, duly authenticated, charging appellant with crimes under the laws of North Carolina. N. C. CONSOL. STAT. § 3924 (W), (b, c). The papers further contained: (1) an order of the Criminal Court of Buncombe County, North Carolina, reciting appellant's conviction under that indictment and imposing sentence upon appellant under the first count and suspending imposition of sentence under the second count; (2) the *capias* issued by that court ordering the arrest of appellant; and (3) the verified application of the Solicitor setting forth that appellant had violated the conditions of probation granted him by the court, that he had fled from the jurisdiction, and that he is now wanted in that State for revocation of the suspended sen-

tence under the first count of the indictment, and for imposition of sentence on the second count. The latter application was filed with the Governor and made part of the requisition papers pursuant to the laws of North Carolina. N. C. CONSOL. STAT. § 4556 (23).[1] Appellee respectfully submits that these papers, properly authenticated as required by law, are sufficient to sustain the action of the Chief Justice in ordering appellant's extradition to North Carolina.

Section 2, article 4 of the United States Constitution provides that:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

Section 5278 of the United States Revised Statutes, 18 U. S. C. § 662, prescribes the procedure necessary to put into effect the Constitutional provision. A duty is thereby imposed upon the executive authority of any state in which is found a person charged with crime against the laws of another state, and who has fled from its justice, to cause such person to be

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[1] This statute provides:

"II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

"III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application * * *."

arrested and secured, whenever the executive authority of the offended state demands such person as a fugitive from justice, and produces either a copy of an indictment found or an affidavit made before a magistrate, charging the person demanded with having committed a crime therein.

The provisions of Section 5278, Rev. Stat., have been made applicable to the District of Columbia by the Act of March 3, 1901. D. C. Code (1929) tit. 6, § 377. By that Act there is imposed upon the Chief Justice of the District Court of the United States for the District of Columbia the same duties imposed upon a governor of a state in matters of extradition. *Hill* v. *Dorsey,* 57 App. D. C. 305, 22 F. 2d 1003; *Reed* v. *Colpoys,* 69 App. D. C. 163, 99 F. 2d 396, *cert. denied,* 305 U. S. 598.

Under these statutes, to justify extradition, it must appear to the Chief Justice of the District Court, upon whom demand is made, first, that the person demanded is substantially charged with a crime against the laws of the demanding state, either by an indictment or an affidavit of a magistrate, certified as authentic by the governor of that state; and second, that the person demanded is a fugitive from the justice of that state.

> *Pierce* v. *Creecy,* 210 U. S. 387, 401, 28 S. Ct. 714, 52 L. ed. 1113;
>
> *Appleyard* v. *Massachusetts,* 203 U. S. 222, 228, 27 S. Ct. 122, 51 L. ed. 161;
>
> *Roberts* v. *Reilly,* 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544;
>
> *Ex parte Reggel,* 114 U. S. 642, 5 S. Ct. 250, 29 L. ed. 250.

If the requisition documents disclose these facts, extradition is sufficiently authorized, and arrest of the alleged fugitive may be ordered. *Marbles* v. *Creecy,* 215 U. S. 63, 67, 30 S. Ct. 32, 54 L. ed. 92. Proof, apart from the requisition papers themselves, is not required to justify the action of the chief executive. And—in a proceeding to review such action—the warrant for the removal of the alleged fugitive is presumed to be valid and sufficient, until clearly overthrown by competent proof.

Marbles v. *Creecy*, 215 U. S. 63, 30 S. Ct. 32, 54 L. ed. 92;

Pettibone v. *Nichols*, 203 U. S. 192, 204, 27 S. Ct. 111, 51 L. ed. 148;

Munsey v. *Clough*, 196 U. S. 364, 372, 25 S. Ct. 282, 49 L. ed. 515;

Hogan v. *O'Neill*, 255 U. S. 52, 56, 41 S. Ct. 222, 65 L. ed. 497;

South Carolina v. *Bailey*, 289 U. S. 412, 417, 421, 53 S. Ct. 667, 77 L. ed. 1292.

In the present case appellant does not challenge the regularity of the warrant of removal as such but only the sufficiency of the requisition papers and the finding of fugitivity.

The proceeding for a writ of *habeas corpus* to test the validity of extradition is a summary one to be kept within narrow bounds, "not less for the protection of the liberty of the citizen than in the public interest." *Biddinger* v. *Commissioner of Police*, 245 U. S. 128, 135, 38 S. Ct. 41, 62 L. ed. 193. The scope of the inquiry accordingly is limited to a consideration and determination by the court of whether the petitioner is charged with crime in the demanding state, whether he is a fugitive from the justice of that state, and whether a demand in due form has been made. All other matters are immaterial to the proceeding. See

Drew v. *Thaw*, 235 U. S. 432, 35 S. Ct. 137, 59 L. ed. 302;

Biddinger v. *Commissioner of Police*, 245 U. S. 128, 135, 38 S. Ct. 41, 62 L. ed. 193;

Hogan v. *O'Neill*, 255 U. S. 52, 41 S. Ct. 222, 65 L. ed. 497;

Blevins v. *Snyder*, 22 F. 2d 876, 57 App. D. C. 300;

State ex rel. Lea v. *Brown*, 64 S. W. (2d) 841, 166 Tenn. 669, *cert. denied*, 292 U. S. 638.

The term "charged with crime" is employed in the Constitution and § 5278, Rev. Stat., in its broad sense. It includes all persons accused of crime by legal proceedings, the charge being a continuing one until such person has been tried and acquitted, or, if convicted, until the sentence imposed has

been satisfied. As was said in this respect by the Circuit Court of Appeals for the Sixth Circuit in *Hughes* v. *Pflanz,* 138 F. 980, 983:

> The term "charged with crime," as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of "charged with crime" as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice.

This view, which represents the overwhelming weight of authority, gives effect to the public purpose underlying extradition proceedings. That purpose is to secure the prompt and efficient administration of the criminal laws of the states and to prevent the successful escape of persons accused of crime, whether convicted or unconvicted. In this respect, "A person can be said to be charged with crime as well after conviction as before," so long as there remains in force against such person an unsatisfied judgment of sentence. *Drinkall* v. *Spiegel,* 68 Conn. 441, 36 A. 830; see *In re Hope,* 10 N. Y. S. 28. It is vital to every state, as well as to society in general, that those who commit crimes in one jurisdiction within the United States shall not find asylum in another, as appellant is seeking to do in this case. See *Appleyard* v. *Massachusetts,* 203 U. S. 222,

227, 27 S. Ct. 122, 51 L. ed. 161; *McNichols* v. *Pease,* 207 U. S. 100, 112, 28 S. Ct. 58, 52 L. ed. 121; *Ex Parte Anthony,* 198 Wash. 106, 87 Pac. (2d) 304; *State ex rel. Treseder* v. *Remann,* 165 Wash. 92, 4 Pac. (2d) 866.

Accordingly it is well established that one who commits crime in a particular jurisdiction and is tried and convicted therein upon an indictment charging such crime, owes a continuing obligation to that jurisdiction, until the penalty imposed by law has been satisfied. So long as that obligation exists, the defendant stands charged with crime and is subject to extradition.

Thus, the general rule is that one convicted of crime, who has been paroled and who has left the state, either in violation of his parole or in obedience to a condition of his parole, and thereafter violates the same, is a fugitive charged with crime in the demanding state.

> *Reed* v. *Colpoys,* 69 App. D. C. 163, 99 F. 2d 396, *cert. denied,* 305 U. S. 598;
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> *Drinkall* v. *Spiegel,* 68 Conn. 441, 36 A. 830;
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> *Hughes* v. *Pflanz,* 138 F. 980 (C. C. A. 6);
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> *Ex parte McBride,* 101 Cal. App. 251, 281 Pac. 651;
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> *Ex parte Hamilton,* 41 Okla. Cr. 322, 273 Pac. 286, 288;
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> *State ex rel. Treseder* v. *Remann,* 165 Wash. 92, 4 Pac. (2d) 866;
>
> *State* v. *Hoffmeister,* 336 Mo. 682, 80 S. W. (2d) 195;
>
> *Johnson* v. *Lowry,* 183 Ga. 207, 188 S. E. 23;
>
> Note, 78 A. L. R. 419.

In *Reed* v. *Colpoys,* 69 App. D. C. 163, 99 F. 2d 396, *cert. denied,* 305 U. S. 598, Reed was convicted in Illinois and sentenced to the State Penitentiary for a period of from one to fourteen years, for the crime of assault to rob. He was thereafter paroled and permitted to go to Virginia. In violation of his parole agreement, he failed to submit a report. A warrant for his arrest thereupon was issued by the State of Illinois. The Chief Executive of that State forwarded requisition papers to the Chief Justice of the District Court of the United States

for the District of Columbia for the extradition of Reed, representing therein that he was charged in Illinois with crime and that he had fled from the justice of that State and taken refuge in the District of Columbia. This Court held that, as Reed had not served the complete term of sentence, he stood charged with crime and was a fugitive from justice, subject to extradition, although he had been released on parole and permitted to leave the jurisdiction.

In *Drinkall* v. *Spiegel,* 68 Conn. 441, 36 A. 830, Drinkall was tried and convicted in the State of New York for burglary. During his term of imprisonment, he was permitted to leave the reformatory, upon his agreement to comply with certain conditions sanctioned by the law of that State. The terms of his parole permitted Drinkall to go to the State of Michigan, where employment had been obtained for him. Drinkall, however, did not go to Michigan, but went instead to Connecticut, where he was arrested. In answer to the contention that he was not charged with crime, the Supreme Court of Connecticut held that Drinkall's responsibility for the crime of burglary continued until his term of imprisonment was satisfied, and he was, therefore, still charged with crime within the meaning of the extradition law.

In *Hughes* v. *Pflanz,* 138 F. 980 (C. C. A. 6), Hughes was convicted of larceny in Indiana and was sentenced for a term of not less than one year nor more than fourteen years. He was committed to the penitentiary and subsequently was released under a parole agreement. He was permitted "to go outside of the buildings and inclosure of said reformatory, upon the conditions stipulated." Hughes violated the conditions of the parole agreement, and his arrest and return to the penitentiary were ordered. He departed from Indiana after his parole was granted and was arrested in Kentucky for extradition. A petition for a writ of habeas corpus was filed on the ground that violating parole was not a crime under the laws of Indiana; that he was not charged with a crime of any kind for which he could be arrested and further punished, but only with a conviction of crime. The Court held that the charge of larceny, upon which he was convicted, continued to be a charge against Hughes until the sentence imposed upon

that conviction had been completely and fully performed, and consequently he stood charged with crime.

These authorities cannot be distinguished from the present case on the ground that appellant is not on parole. The rule of these cases—which renders parole violators extraditable—is equally applicable to convicted defendants, who, like appellant, have their freedom either by reason of suspension or continuance of sentence or by stay of execution of sentence.

Whether or not such action is, in effect, probation is of no consequence.[1] Appellant has never been sentenced under the second count in any event. See *Cappola* v. *Platt*, 123 Conn. 38, 192 A. 156, *cert. denied*, 302 U. S. 726; *Commonwealth* v. *Steele*, 78 Pa. Super. 352; *Ex Parte McBride*, 101 Cal. App. 251, 281 Pac. 651.

In *Cappola* v. *Platt, supra,* which, it is submitted, presents a factual situation substantially similar to that involved on this appeal, the defendant pleaded guilty to a crime in the State of Massachusetts and—prior to the imposition of sentence—was placed upon probation. He was not required to remain within the jurisdiction. Thereafter, extradition of the defendant from Connecticut was requested by the Governor of Massachusetts. It was held that one who was free because of suspension of sentence remained subject to the imposition of a penalty for the offense which he had committed and therefore was charged with a crime and was a fugitive from justice. Consequently, he was held to be subject to extradition.

In this connection it must be noted that the charge upon which a person on probation or parole can be extradited is not the act which constitutes the violation of probation or parole, but, on the contrary, the very crime which was the subject of the original prosecution. To argue, as appellant

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[1] "Probation is a substitute for imprisonment. It is a conditional suspension of sentence. It is applied on the theory that, if allowed to retain his liberty and be at large among the people under certain regulations and supervision, the convicted person will not engage in a criminal course of conduct." *People* v. *Robinson*, 253 Mich. 507, 511, 235 N. W. 236.

does, that an indictment cannot be made the basis of extradition if a conviction has already been obtained thereunder, is to misconceive the very basis of extradition, as defined by the authorities above discussed. A man stands charged with an offense—even after conviction—until the penalty which the law imposes has been paid. The Supreme Court of New Mexico adequately disposed of this contention in the case of *Ex parte Nabors,* 33 N. Mex. 324, 267 Pac. 58.

In the *Nabors* case, the petitioner was indicted, convicted, and sentenced in California. After serving a part of the sentence, he was granted a parole. Pursuant to the conditions of that parole he went to New Mexico. While in that state he violated his parole, and the Prison Board of California revoked it. In opposition to an effort by the State of California to extradite Nabors, he contended that all charges upon which the State of California sought to deal with him related to conduct and acts performed in New Mexico, and that, even if such charges rendered him amenable to any punishment in California or to the revocation of his parole, the fact that they were not committed in that state, and that he did not leave that state after their commission, conclusively established that he was not subject to extradition. The court, in a thorough analysis of the authorities, held that there was no merit to the contention, and stated:

> In determining the two questions before us, it is important to avoid confusion as to the crime charged against petitioner for which California desires to exact punishment. Petitioner contends as if the charged offenses were the matters stated as the occasion and reason for the revocation of his parole. If we regard the accusation as involving merely the leaving of Sandoval county, or the having of firearms in his possession, it would be difficult to hold, either that there was a substantial charge of any offense under the law of California, or that petitioner is a fugitive from the justice of that state. Such is not, however, the correct view to take of the charge. The accusation is founded upon the

> felony of which he stands convicted. For this his punishment is not complete. For this California demands his extradition. There is abundant and well-reasoned authority that this is the correct view in a case where one whose parole has been revoked contends that he is not a fugitive. Perhaps the leading case is Drinkall v. Spiegel, 68 Conn. 441, 36 A. 830, 36 L. R. A. 486, where the doctrine is developed that one who is allowed to go at large upon parole becomes, upon the revocation of his ticket of leave, in legal effect, an escaped convict, and may, if found outside the state, be extradited, not necessarily for the escape, nor for the violation of parole, but for the original crime which he has not fully expiated.

See, *Cappola* v. *Platt,* 123 Conn. 38, 192 A. 156, *cert. denied,* 302 U. S. 726; *Albright* v. *Clinger,* 290 Mo. 83, 234 S. W. 57, 59; *State ex rel. Treseder* v. *Remann,* 165 Wash. 92, 4 Pac. (2d) 866.

In *State* v. *Everett,* 164 N. C. 399, 79 S. E. 274, the Supreme Court of North Carolina, in considering a related question, held that a judgment imposed after revocation of a suspended sentence constituted punishment for the original offense and not for the act constituting the breach of probation. The Court there said:

> Nor can it be well argued that the judge had, by the judgment, punished the defendant for his subsequent conduct. This is a misapprehension of its legal effect. He has simply punished him for the crime he had confessed, because he has violated the terms upon which clemency was impliedly promised. But this is merely the reason for awarding punishment in the original case, and is no part of the offense for which it was inflicted. This very point was urged in the similar case of Sylvester v. State, 65 N. H. 193, 20 Atl. 954, where the defendant was indicted for the illegal sale of liquor, and the mittimus was ordered to be stayed "while he does not sell liquor," and it was held that "the enforcement of the judgment of mittimus was not a punishment for

subsequent offenses, or for breach of the condition on which execution was stayed."

To sustain the action of the executive in ordering a fugitive's return, in a case like the present, the requisition papers need contain, therefore, only a copy of the original indictment upon which the conviction rests. Constitutional and statutory requirements thereby are satisfied. *State ex rel. Treseder* v. *Remann,* 4 Pac. (2d) 866, 165 Wash. 92; *Albright* v. *Clinger,* 290 Mo. 83, 234 S. W. 57, 59. See *Rummerfield* v. *Watson,* 70 S. W. (2d) 895, 335 Mo. 71. In the latter case it was held that the copy of the judgment of conviction was not a necessary part of the requisition papers, for it tended to prove merely the defendant's guilt of the crime charged. See *Drinkall* v. *Spiegel,* 68 Conn. 441, 36 A. 830. Likewise, it has been held that the court, in a habeas corpus proceeding, can assume that a warrant revoking parole or probation was properly issued. Such assumption, of course, dispenses with the necessity of its inclusion as a part of the requisition papers. See *Cappola* v. *Platt,* 192 A. 156, 123 Conn. 38, *cert. denied,* 302 U. S. 726.

It is equally well established that the legality of the revocation of the parole or probation of a prisoner is a question solely for the judicial authorities of the demanding state and is not to be determined by the asylum state. The nature of suspension of execution of sentence and of a continued prayer for judgment, together with power of the court to lift the suspension or impose judgment are questions within the exclusive province of the North Carolina courts. With respect to these matters, see *State* v. *Crook,* 115 N. C. 760, 20 S. E. 513; *State* v. *Burnett,* 174 N. C. 796, 93 S. E. 473; *State* v. *Ray,* 212 N. C. 748, 194 S. E. 472. The latter alone have the right to construe the laws of that state, and to determine the guilt or innocence of the person whose return is sought. *Ex parte Foster,* 61 Pac. (2d) 37, 60 Okla. Cr. 50; *State* v. *Hoffmeister,* 336 Mo. 682, 80 S. W. (2d) 195, 196; *Drinkall* v. *Spiegel,* 68 Conn. 441, 36 A. 830. See *Drew* v. *Thaw,* 235 U. S. 432, 35 S. Ct. 137, 59 L. ed. 302; *Hale* v. *Crawford,* 65 F. 2d 739 (C. C. A. 1), *cert. denied,* 290 U. S. 674. As was said in *State* v. *Greer,* 173 N. C. 759, 92 S. E. 147, proceedings to de-

termine whether a condition of a suspended sentence has been breached are addressed to the reasonable discretion of the trial court.

Likewise, courts of the asylum state are without power to inquire into the validity or constitutionality of the judgment of conviction. Whether that judgment was violative of the Constitution or of the laws of the state in which rendered is a matter for the courts of the demanding state exclusively.

In *State ex rel. Lea* v. *Brown*, 64 S. W. (2d) 841, 166 Tenn. 669, *cert. denied*, 292 U. S. 638, the Supreme Court of Tennessee, in answering a contention that the trial and conviction in the demanding state violated petitioner's constitutional rights, advanced as a basis for denying extradition, held that it was without power to inquire into the validity of a judgment of conviction obtained in the demanding state. The court there said:

> Being without jurisdiction to enforce the judgment of North Carolina, the courts of Tennessee are without jurisdiction to inquire into the validity of such judgment as a basis for granting or denying extradition. And, if the relators have been denied due process of law by the courts of North Carolina, with respect to matters not already adjudicated, they should be left free to present such matters to a state or federal court to which the State of North Carolina is subject, whenever that state, having regained custody of them, endeavors to enforce its judgment. The relators will remain under the protection of the Federal Constitution, if returned to North Carolina, and this proceeding for the writ of habeas corpus is a summary proceeding, "to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest."

Compare *Drew* v. *Thaw*, 235 U. S. 432, 35 S. Ct. 137, 59 L. ed. 302; *Biddinger* v. *Commissioner of Police*, 245 U. S. 128, 38 S. Ct. 41, 62 L. ed. 193; *Blevins* v. *Snyder*, 57 App. D. C. 300, 22 F. 2d 876, holding that all matters of defense to the crime charged must be determined solely by the court where the fugitive is to be tried.

Appellee earnestly submits that the principles and authorities above discussed clearly establish that the appellant in this case has been substantially charged with crime under the laws of North Carolina and that his extradition has been properly ordered. The requisition papers contain a duly authenticated copy of an indictment charging a violation of the criminal laws of North Carolina. Such indictment, by itself, is sufficient, under the cases relied upon, to sustain the warrant of arrest and order of surrender issued by the Chief Justice of the District Court. The fact that the requisition papers contain, in addition, the Order of Judgment of the Buncombe County Court, setting forth the sentences imposed in the criminal prosecution, the *capias* ordering appellant's arrest, and an affidavit relating the facts upon which the request for extradition was based, cannot be urged to defeat appellant's return to North Carolina. Obviously, they serve to strengthen rather than weaken the case. *Drinkall* v. *Spiegel,* 68 Conn. 441, 36 A. 830, 831.

Contrary to appellant's contention, his extradition was not based upon any of these papers other than the indictment. It must, and can, be sustained on the indictment alone. These papers serve merely to substantiate the charge made in the indictment. Therefore, even conceding, for purposes of argument, that the affidavit may be based, in part, upon information and belief, and that the *capias* possibly may have been illegally issued by the court of North Carolina, they are matters which cannot properly be considered by the courts of this jurisdiction. They do not constitute necessary essentials to the issuance of the warrant of arrest. See *Ex parte Reggel,* 114 U. S. 642, 5 S. Ct. 250, 29 L. ed. 250.

Hence, to argue that the *capias,* issued for the sole purpose of securing appellant's arrest, was not founded upon proper affidavits, is to inject into the case immaterial and irrelevant issues. As above indicated, rendition in the present case is not founded upon the *capias.* Appellant's contention that it is so founded reveals a fundamental misunderstanding on his part of the law in that respect. Appellant's return to North Carolina is sought to require him to satisfy an obligation imposed as a consequence of the commission of the original

offenses charged in the indictment. It was not for the purpose of subjecting him to trial for new offenses. The *capias* was but a means employed by the state to bring appellant before the court. Whether its issuance had legal or factual support is a matter which must be decided by the courts of North Carolina alone. See *Drew* v. *Thaw,* 235 U. S. 432, 35 S. Ct. 137, 59 L. ed. 302; *Ex parte Foster,* 61 Pac. (2d) 37, 39, 60 Okla. Cr. 50; *State* v. *Hoffmeister,* 336 Mo. 682, 80 S. W. (2d) 195, 196.

Appellant further contends, in effect, that since the time of suspension of his sentence had expired prior to the date of the request for extradition, he is no longer subject to the jurisdiction of the North Carolina court, and the order for his surrender to that state was improper. On February 18, 1935, the court of North Carolina in rendering judgment upon appellant's conviction suspended execution of the sentence on the first count for a period of five years, and continued prayer for judgment on the second count for a like period. Prior to the expiration of that period, on October 19, 1939, the *capias* ordering appellant's arrest was issued by the North Carolina court. There remained, at that time, more than four months of the period of probation. Until appellant could be apprehended the court was without authority to revoke the probation and to order the execution and imposition of sentences under the two counts of the indictment. Certainly, one cannot nullify the jurisdiction and authority of a court granting probation, by staying in hiding or by absenting himself from the state until after the time of probation has expired. The *capias,* therefore, must be deemed to have stayed the running of the five-year period. See *People ex rel. Patterson* v. *Bockel,* 270 N. Y. 76, 200 N. E. 586. See also, *State* v. *Vickers,* 184 N. C. 676, 114 S. E. 168; *Ex parte Hinson,* 156 N. C. 250, 72 S. E. 310.

Furthermore, appellant's contention that the order of the Buncombe County Court extending the judgment of that court in the criminal prosecution for a period of five years was illegal and void under the laws of that State is not germane to the issues. This contention, like many of the other conten-

tions advanced by appellant, constitutes an issue for the sole determination of the North Carolina courts.

It is respectfully submitted, therefore, that appellant stands charged with crime for which his extradition was properly ordered.

II

Appellant is a fugitive from the justice of North Carolina

The contention is advanced on behalf of appellant that he is not a fugitive from justice, because the judgment of conviction rendered by the court of North Carolina did not require him to remain within the state; therefore, when the *capias* for his arrest was issued, he was lawfully outside of the jurisdiction and beyond the pale of the extradition law. This contention, it is submitted, runs counter to the great weight of established authority.

The rule is well settled that one is a fugitive from justice within the purview of the constitutional provision governing extradition, who, having been charged with crime in the demanding state, leaves that state for *any purpose* whatsoever.

> *Ex parte Reggel,* 114 U. S. 642, 55 S. Ct. 250, 29 L. ed. 250;
>
> *Reed* v. *Colpoys,* 69 App. D. C. 163, 99 F. 2d 396, *cert. denied,* 305 U. S. 598;
>
> *Barrett* v. *Bigger,* 57 App. D. C. 81, 17 F. 2d 669, *cert. denied,* 274 U. S. 752.

In *Appleyard* v. *Massachusetts,* 203 U. S. 222, 227, 27 S. Ct. 122, 51 L. ed. 161, the Supreme Court construed the applicable provision as follows:

> A person charged by indictment or by affidavit before a magistrate, with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and

> if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State.

In *Roberts* v. *Reilly*, 116 U. S. 80, 97, 6 S. Ct. 291, 29 L. ed. 544, a fugitive from justice was described as one who has committed a crime within a state and, "when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." See *Hogan* v. *O'Neill*, 255 U. S. 52, 41 S. Ct. 222, 65 L. ed. 497.

Just as one can be "charged with crime" after conviction as well as before, so also can he be a fugitive with respect to that charge. *Reed* v. *Colpoys* 69 App. D. C. 163, 99 F. 2d 396, *cert. denied*, 305 U. S. 598; *Albright* v. *Clinger*, 290 Mo. 83, 234 S. W. 57, 58. As was said in *Drinkall* v. *Spiegel*, 68 Conn. 441, 36 A. 830, "A man is still a fugitive from justice so long as he has departed, [from a state] leaving its demands unsatisfied." Thus, the question of whether the appellant left the jurisdiction of North Carolina lawfully and in accordance with the terms of his sentence is immaterial. The purpose or motive prompting a person to leave can have no effect upon the question of fugitivity. See Note, 13 A. L. R. 415. The cases cited and discussed in the preceding section of this brief uniformly hold that a person on parole or probation who, at the time of revocation of that parole or probation is outside of the jurisdiction, is a fugitive from justice and subject to rendition upon requisition.

See:

> *Reed* v. *Colpoys*, 69 App. D. C. 163, 99 F. 2d 396, *cert. denied*, 305 U. S. 598;
>
> *Drinkall* v. *Spiegel*, 68 Conn. 441, 36 A. 830;
>
> *Hughes* v. *Pflanz*, 138 F. 980 (C. C. A. 6);
>
> *People ex rel. Hutchings* v. *Mallon*, 218 N. Y. S. 432, *aff'd without opinion*, 245 N. Y. 521;

Ex parte Nabors, 33 N. Mex. 324, 267 P. 58;
Ex parte McBride, 101 Cal. App. 251, 281 P. 651;
Ex parte Foster, 60 Okla. Cr. 50, 61 P. (2d) 37;
Brown v. *Lowry,* 185 Ga. 539, 195 S. E. 759;
People ex rel. Luman v. *Smith,* 352 Ill. 496, 186 N. E. 159;
Ex parte Garvey, 112 S. W. (2d) 747 (Tex. Cr. App.);
Ex parte Gordon, 105 Vt. 277, 165 A. 905;
Note, 51 HARV. LAW REV. 1445;
Note, 78 A. L. R. 419.

III

The motive or purpose of the demanding state in seeking the return of a fugitive is not open to inquiry on habeas corpus

Throughout the proceedings in this Court and in the court below, the appellant has repeatedly contended that his return to North Carolina has not been sought in good faith, but for an ulterior and malicious purpose; that he is the victim of a politically inspired scheme to secure his return in order to subject him to maltreatment and undue punishment. Evidence was offered by the appellant in the court below to substantiate this contention, but was excluded. This is now urged as error. It is submitted that the court's ruling in this respect was proper, and should be sustained.

In a proceeding of the nature here involved, the motive and purpose of the authorities of the demanding state, in requesting extradition, is immaterial.

DePoilly v. *Palmer,* 28 App. D. C. 324.
Goodale v. *Splain,* 42 App. D. C. 235.
Blevins v. *Snyder,* 57 App. D. C. 300, 22 F. 2d 876.
Note, 94 A. L. R. 1493, and cases there cited.

The Supreme Court of the United States has considered the question to be so well settled as to require no elucidation. In *Drew* v. *Thaw,* 235 U. S. 432, 35 S. Ct. 137, 59 L. ed. 302, Mr. Justice Holmes said, "There is no discretion allowed, no inquiry into motives." And in *Pettibone* v. *Nichols,* 203 U. S.

192, 203, 217, 27 S. Ct. 111, 51 L. ed. 148, it was held to be conclusively presumed that the governors of the asylum and the demanding states proceeded "with no evil purpose and with no other motive than to enforce the law." Consequently, judicial inquiry does not extend to consideration of a contention that a fugitive's return is sought solely for political or other irregular purposes. *United States* v. *Superintendent of County Prisons,* 111 F. 2d 409 (C. C. A. 3).

Furthermore, whether appellant will be afforded a fair and impartial hearing when returned to North Carolina is likewise not a matter for the determination of this Court. That appellant will be granted such a hearing must be assumed. *Marbles* v. *Creecy,* 215 U. S. 63, 69, 30 S. Ct. 32, 54 L. ed. 92; *Blevins* v. *Snyder,* 57 App. D. C. 300, 22 F. 2d 876; *United State* v. *Superintendent of County Prisons,* 111 F. 2d 409 (C. C. A. 3).

CONCLUSION

The requisition papers served upon the Chief Justice of the District Court of the United States for the District of Columbia, and the evidence presented to the court below, clearly and unequivocally substantiate the finding of the Chief Justice that appellant stands charged with crime in North Carolina and is a fugitive from the justice of that state. The order of surrender issued by the Chief Justice, therefore, was proper.

Appellant's brief is directed principally to a discussion of matters and issues not properly before the court in a *habeas corpus* proceeding of this nature. Contained therein is a personal attack impugning the motives of certain officials of the State of North Carolina in seeking appellant's return. Such attack and comments are obviously irrelevant to the questions involved, confusing to the issues, and, consequently, a disservice to this Honorable Court. As the Supreme Court has said, the authorities of the several states, in seeking extradition, must be presumed to have proceeded honestly and sincerely and with no evil purpose and with no motive other than to enforce the law. *Pettibone* v. *Nichols,* 203 U. S.

192, 203, 217, 27 S. Ct. 111, 51 L. ed. 148. It is respectfully submitted, therefore, that such inappropriate and derogatory statements contained in appellant's brief be disregarded by this Court.

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REPLY BRIEF FOR APPELLANT

IN THE

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v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA.

Appeal from the District Court of the United States for the District of Columbia.

T. EDWARD O'CONNELL,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appeal from the District Court of the United States for the District of Columbia.

REPLY BRIEF FOR APPELLANT.

I.

Appellee Concedes the Gross Error Committed by the Lower Court in Basing a Finding of Fugitivity Upon the Mere Issuance of a Capias, by Abandoning Such a Contention, and Attempting to Justify the Finding of Fugitivity Without Considering the Capias.

The lower court found as a fact (R. 209):

> "7—The petitioner is a fugitive from justice from the State of North Carolina and has been a fugitive from justice from the State of North Carolina from or

about the time of the issuance of the capias above mentioned."

At the conclusion of the Habeas Corpus hearing the lower court in explaining the reason for its finding stated (R. 172):

". . . *and it would seem to me that he became a fugitive on October 19, of last year when the capias was issued.*"

In the lower court counsel for appellee stated (R. 156)

"WE ARE RELYING ON THIS CAPIAS ENTIRELY."

At no time did appellant urge upon the lower court that the mere presentation of the indictment constituted appellant a fugitive, after appellant had been tried on that indictment, convicted, judgment pronounced, terms of judgment complied with, bond discharged and appellant free to go his way without any restrictions as to his traveling all over the face of the earth and with no requirement that he report to anyone. Obviously, appellee knows that the finding of fugivity, based upon the illegally issued capias, cannot be sustained by this court.

Despite the Fnding of Fact No. 7 previously quoted herein, that appellant is a fugitive by reason of the capias, appellee states to this court in his Brief (P. 19)

"IT, (EXTRADITION) MUST, AND CAN, BE SUSTAINED ON THE INDICTMENT ALONE."

If the capias had nothing to do with appellant becoming a fugitive, when did he become one? Obviously, he was not a fugitive when he walked out of court after paying the fine and costs which he *elected* to pay in lieu of a sentence to hard labor. The court below found as a fact that he had never, since that time, been charged with violation of any law, State or Federal, and the court stated (R. 173)

"* * * AND IT IS ADMITTED THAT HE HAS PERFORMED ON GOOD BEHAVIOR."

Then what makes him a fugitive? The court below says "The Capias." Appellee says, *in this court,* "No, not the capias, the indictment."

Is it not perfectly clear that, before appellant becomes a fugitive, he must be charged either with a subsequent crime or a violation of some condition attaching to suspension of sentence? No charge of either kind has been filed in this cause. (R. 208-9)

If, as *now* urged by appellee, appellant is a fugitive, what makes him one? Appellee says that the sending of a duly authenticated copy of an indictment to this jurisdiction, precludes the consideration of any other matter. Following this reasoning, had appellant been acquitted he must yet return to North Carolina and present that fact, "for the courts of the asylum state are confined to an examination of the extradition papers."

Appellant was *given his choice.* He *elected* a monetary penalty rather than a jail sentence. In view of the lower court's finding that he had paid the penalty, which he elected, and that no charge of any breach of either the law or condition of suspended sentence had ever been filed against him, if the contention of appellee be correct, then appellant would still be a fugitive in this case, even had he elected and served the penitentiary sentence at hard labor.

Such is not Justice and consequently not the law.

The indictment sought to be used as a basis for appellant's extradition has served its purpose by having brought appellant to the original trial, conviction and judgment. The alternative sentence *imposed* upon appellant having been complied with (Findings of Fact R. 209) obviously an affidavit alleging a subsequent offense of some kind must be included in the extradition papers to justify extradition and, it is fundamental that such affidavit (in extradition proceedings) shall be upon PERSONAL KNOWLEDGE rather than upon information and belief. No affidavit of any kind is offered as a basis for these proceedings (R. 209)

> "To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of

> crime something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact." Ex parte Hart, 63 Fed. Rep. 259.

Appellant offered evidence in the lower court that no offense triable in Buncombe County, to which removal was sought, had been committed by him. Fugitivity being a question of fact, and not of law, appellant offered evidence to show that this proceeding, masquerading as a lawful demand was *in fact* an unlawful, illegal, malicious attempt to pervert the judicial processes to the private purposes of certain individuals including appellant's former prosecutor. Of course, *if there is a lawful demand,* the malice will not be considered in extradition. In this case *there is the malice,* but an absolute lack of any legal basis for the demand. Appellant's offer of such evidence was excluded by the lower court, despite the ruling in the case of *Johnson* v. *Zerbst* (304 U. S. 458) holding that the court might go outside the record if necessary, to see that substantial justice be done.

> "One held for removal to another Federal district for trial is entitled to discharge on Habeas Corpus because of the exclusion of evidence that no offense triable in the District to which he was sought to be removed had been committed by him and on the theory that a certified copy of the indictment and proof of identity of the party accused furnished conclusive evidence of probable cause."
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> *Kessler* v. *Treat*, 205 U. S. 33, 27 Sup. Ct. Rep. 434.

II.

Appellee Urges that the Basis for Extradition is the Indictment Alone and that the Capias "Is Immaterial and Irrelevant to the Issues." Appellee then Urges the Importance of the Capias as Staying the Running of the Five Year Period, thus Continuing Buncombe County's Jurisdiction Over Appellant.

THE BUNCOMBE COUNTY JUDGE WHO ISSUED THE CAPIAS CONCEDED THAT THE CAPIAS HAD NO EFFECT UPON AND DID NOT STAY THE RUNNING OF THE FIVE-YEAR PERIOD. He conceded this by his action, two days after the five-year period had ended, in entering a formal order extending the five-year suspension for another five years, which order was admitted at the Habeas Corpus hearing to have been useless. (R. 137 and 156.) Appellee urged upon the court below that the capias stayed the running of time of suspension of sentence. The court below asked (R. 136),

> "Then why did he make the extension of the 19th of February?"

Appellee states (R. 137),

> "I think that order of February was useless."

Of course it was useless, but it is an unqualified acknowledgment by the Buncombe County Judge that the illegally issued capias did not stay the running of the five-year period.

Section 4655, Paragraph 4, Code of Criminal Procedure of the State of North Carolina, reads as follows:

> *"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time within the above limit."*

Realizing that the order of extension is of no effect, (conceded by appellee in the lower court) he states (p. 20 of his

> crime something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact." Ex parte Hart, 63 Fed. Rep. 259.

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Of course it was useless, but it is an unqualified acknowledgment by the Buncombe County Judge that the illegally issued capias did not stay the running of the five-year period.

Section 4655, Paragraph 4, Code of Criminal Procedure of the State of North Carolina, reads as follows:

> *"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time within the above limit."*

Realizing that the order of extension is of no effect, (conceded by appellee in the lower court) he states (p. 20 of his

brief) "the capias therefore must be deemed to have stayed the running of the five year period". The lower court found as a fact (R. 209) that the issuance of the capias was not based upon any affidavit, that no affidavit was submitted to the Judge who issued the capias, and that Judge himself states (R. 229) that no one requested that he issue the capias.

Appellee now tells this Court that, though the law forbids the extension of any suspended sentence beyond a limit of five years, the Judge of Buncombe County may violate the provisions of that law by adopting the subterfuge of issuing a capias, without any reason for so doing, legal or otherwise, and thus do indirectly what is forbidden to be done directly.

Appellee states in his brief (p. 19):

> "Therefore, even conceding, for purposes of argument, that the affidavit may be based, in part, upon information and belief, AND THAT THE CAPIAS POSSIBLY MAY HAVE BEEN ILLEGALLY ISSUED by the court of North Carolina, they are matters which cannot be properly considered by the courts of this jurisdiction."

The Court below found as a Fact that no affidavit whatever was filed in this proceeding as a basis for appellant's arrest. Appellee urges upon this Court the absurd proposition that the issuance of the capias stayed the running of the five-year period even though the capias was issued illegally. One need not be a student of the law to know that an illegally issued capias is of no legal effect and could not have any possible effect upon the running of the five-year period. Unless the capias stayed the running of the five-year period that period expired on the 17th of February, 1940. Appellant was ordered extradited long after that date, and inasmuch as the lower Court found the capias not to be founded upon any affidavit or other legal foundation that would justify its issuance it is quite apparent that the time of suspension having expired, there was no justification for the lower court holding appellant to be either substantially charged

with crime, or a fugitive from the jurisdiction of the Buncombe County Court.

The hopelessness and futility of appellee's position stands exposed for the sham that it really is when he urges the importance of the capias as stopping the running of the clock on the five-year period, a clear violation of Section 4655 of the North Carolina Criminal Code, and then states (p. 19 his brief):

> "Hence, to argue that the capias, issued for the sole purpose of securing appellant's arrest, was not founded upon *proper* affidavits, is to inject into the case immaterial and irrelevant issues."

The capias was founded upon *no affidavit whatsoever* (Findings of Fact R. 209). The sincerity of appellee is only overshadowed by the inconsistency of his argument, in one breath urging upon this court the importance of the capias as continuing the jurisdiction of the Buncombe County Court over appellant and then stating (p. 19 his brief):

> ". . . rendition in the present case is not founded upon the capias."

and that for appellant to mention the illegality of the issuance of the capias—

> ". . . is to inject into the case immaterial and irrelevant issues."

III.

Appellee Misstates Appellants Position Before this Court; Evades and Ignores the Real Issues Involved; and Fails to Cite One Case Applicable to the Instant One.

Appellee states at Page 14 of his brief, last line:

> "To argue, *as appellant does*, that an indictment cannot be made the basis of extradition if a conviction has already been obtained thereunder, is to misconceive the very basis of extradition . . ."

This statement is wholly untrue. Nowhere in appellant's brief is there one word to justify such an unqualified and gratuitous misstatement.

Appellant's position, stated in unequivocal terms throughout his hearing and his brief on appeal, is that the Buncombe County Court has lost jurisdiction to demand appellant's return by reason of his compliance in full with the judgment imposed upon him and his contention that he owes no obligation to that court under the laws and court decisions of North Carolina, and the further contention that the act of his former prosecutor in ordering his return without any affidavit or other legal foundation is "functus officio" and a violation of appellant's civil liberties and constitutional rights.

Appellee further evades a sincere discussion of the issues involved by selecting for extended discussion one of twenty-three points mentioned in the petition for Writ of Habeas Corpus, which point was abandoned by the petitioner, never mentioned at the Habeas Corpus hearing or in appellant's Brief in this Court. That point is contained in the first three lines of paragraph 22 (R. 5) in the petition and attacks the legality of the sentence but, *is not urged now and was not urged in the court below* and appellee does this court no service in even mentioning and citing cases on a point never mentioned during the Habeas Corpus hearing or in appellant's Brief.

Appellee states (bottom p. 10 of his brief) that the charge against appellant is—

> ". . . a continuing one until such person has been tried and acquitted, or, if convicted, *until the sentence imposed has been satisfied.*"

Of course that is the law. But, where in this whole record is there the slightest indication that appellant did not satisfy the judgment of the court *which was imposed* upon him? The lower court found as a fact that appellant had complied, in full, with the sentence which *had been imposed* upon him and that he had been of good behavior ever since. (R. 173, 209)

Appellee further wanders far afield from the issues with which we are here concerned by citing some fifty cases wherein alleged fugitives were sought to be extradited. Not one of those cases is applicable to this case.

Every case cited by appellee concerns itself with A CHARGE OF A VIOLATION OF A CONDITION OF PAROLE OR PROBATION. In the instant case, as shown by the Findings of Fact, there is not even a charge. In all of the cases cited by appellee, the alleged fugitive attempted to take issue with the charge of a violation of his parole, or probation and was told by the court of the asylum state that such matter must be taken up with the parole board or probation officer in the demanding state. *No such question is involved in this case.* No probation officer, no parole board, and not even the judge who issued capias for appellant's arrest, charges a violation of the conditions of his suspended sentence, or of the law (Findings of Fact 208-9). There is in this case only the demand of a private individual for appellant's return to North Carolina. The act of Judge Nettles in issuing the capias was not a judicial act, for demands for arrest do not originate with a judge, but with a prosecutor. No judge has the right to inaugurate a prosecution and no judge has the right to demand a man's arrest and extradition at his own whim or caprice.

> "the Writ of Habeas Corpus is a protection of the citizen from encroachment upon his liberty from any source . . . equally from the unauthorized acts of courts and judges as those of individuals." In re Bonner, 151 U. S. 242, 14 Sup. Ct. Rep. 323, 38 L. Ed. 149.

> "A judgment, though pronounced by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judges, but upon the settled and invariable principles of justice." Baker v. State, 3 Ark. (3 Pike) 491. Citing State v. Harborne, 45 Atl. 432, 72 Conn. 607.

Appellee cites not one case in which a judge, at his own whim and caprice, ordered the arrest and extradition of a

man. No other case will ever be found in which a judge has acted in a case which he had previously prosecuted.

We are concerned with the question of whether or not appellant is a fugitive under the laws of North Carolina. The question has been answered by the Supreme Court of North Carolina in deciding the very question involved in this case, that is, whether the Buncombe County Court has jurisdiction to order the return of appellant for sentence, after appellant has already complied with one judgment already imposed upon him. Appellee would divert this court's attention from that case by omitting all mention of it from his brief, though it is cited in appellant's brief. That case is *State* v. *Crook*, 115 N. C. 760, 20 S. E. 513, which lays down the rule as follows:

> "It is familiar learning that a court may suspend the judgment of a criminal *in toto* until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count after a subsequent term, or by imposing a fine and at a later term superadding an imprisonment."
>
> Citing State v. Ray, 50 Iowa 520; State v. Miller, 6, Baxter, Tenn. 513; State v. Watson, 8 S. W. 383, 95 Missouri 411; People v. Felix, 45 Cow. 163; Thurman v. State, 54 Ark. 120; Wharton's Criminal Pleadings and Practice, Sec. 913; Whitney v. State, 6 Tenn. 247.

> "There can be only one judgment upon the indictment; and this must be strictly and exclusively upon the particular count or counts upon which the defendant has been found guilty. It is a necessary consequence from this principle, that a judgment rendered and sentence awarded in pursuance thereof, definitively and conclusively disposes of the whole indictment." Edgerton v. Commonwealth, 5 Allen 514 (1862); Commonwealth v. Bennett, 2 Va. Cas. 235; Commonwealth v. Foster, 122 Mass. Rep. (1877) 317.

> "That there could be only one judgment upon the indictment, and that consequently a judgment and sentence upon one count definitively and conclusively dis-

posed of the whole indictment, and operated as an acquittal upon, or discontinuance of the other count. And the same view has been affirmed by decisions in other states. Guenther v. People, 24 N. Y. 100; Girtz v. Commonwealth, 22 Penn. St., 351; Weinzorpflin v. State, 7 Black 186; Stoltz v. People, 4 Scam. 168; State v. Hill, 30 Wis. 416; Kirk v. Commonwealth, 9 Leigh 627; Nabors v. State, 6 Ala. 700; Morris v. State, 8 Sm. and Marsh 762."

"A second judgment on the same verdict is void for want of power and affords no authority to hold appellant a prisoner." Ex Parte Lange, 18 Wall. 163.

"The district court, after judgment rendered in first count of information, has no power to render a second judgment at a later term against the accused under the second count of the indictment *notwithstanding that a continuance was had to a later date with a view of considering action to be taken on second count.*" Gillespie v. Walker, 296 F. 330 (W. Va. 1924).

Every one of the aforementioned cases lays down the rule that a court lacks jurisdiction to sentence twice on the same indictment. Consequently, after the sentence of the Buncombe County Court that appellant pay a fine and costs, *the same having been complied with in full,* that court has lost all jurisdiction over appellant and is without the right to demand his return.

Despite three extra weeks allowed appellee, with the consent of appellant, within which to prepare his brief, not one case is cited by him in which there was a demand made, as here, for the return of a man who had complied in full with the judgment imposed upon him; not one case, as here, in which a judge took it upon himself to order a man's arrest and return without the request of a prosecutor or anyone else; not one case, as here, in which a judge, formerly a prosecutor, was so lacking in principle and decency as to inject himself into a case for the purpose of persecuting one whom he had successfully prosecuted, all of his own volition; not one case in which a state has requested the extradition of a man, upon the strength of an indictment, on

fourteen counts of which he had been acquitted, and on the two counts on which convicted he had *paid IN FULL* the penalty inflicted by the court.

Of all the millions of cases cited in the law books none so foul or odorous as this can ever be found, if appellee searches from now to judgment day.

Appellee cannot honestly urge that there is any debt owed by appellant to the state of North Carolina if he will only read the head note of *State* v. *Crook* (*supra*), North Carolina's leading case on the subject, which clearly holds that one who has been sentenced to pay a penalty, and pays that penalty may never again be punished by that court on any other count in the same indictment. Jurisdiction being an essential element in these proceedings it is clear that appellant is entitled to his release. To hold otherwise is to say that, had appellant been convicted on sixteen instead of two counts of the indictment, the Buncombe County Court could bring him back from another state for sentence on sixteen different occasions.

Appellee evades all mention of and answer to the Supreme Court decisions of the State of North Carolina, cited in appellant's Brief, clearly indicating the lack of jurisdiction in a North Carolina Court to punish a man, upon whom sentence has been suspended, unless there first be filed against that man a charge of violation of the criminal law of North Carolina.

State v. *Hardin*, 112 S. E. 593;
State v. *Everett*, 164 N. C. 399;
State v. *John Gooding*, 134 S. E. 436 (1927); 194 N. C. 271.

And also ignores a case in which a judge attempted to take similar action to that of the Buncombe County judge in this case, cited in appellant's brief. *Gordon* v. *Johnson*, 126 Geo. Rep. 584.

In accordance with the law laid down in the foregoing cases, obviously, appellant could not be a fugitive until an affidavit charging some violation of the law was filed against appellant.

The Findings of Fact (R. 209) show that no such charge, either of violating the law, or of the conditions of suspension of sentence were filed against appellant.

One of the prime purposes of the Writ of Habeas Corpus is to protect the individual against arrogant attempts to pervert the power of the judiciary to satisfy any judge's bitter, personal animosity for another man.

The rule to be laid down in this case far overshadows in importance the predicament of appellant. The Rule in Pelley's Case will be applied to every unfortunate individual who has happened to incur the personal animosity of a judge. If this Honorable Court holds that the abuse of judicial power unlawfully exercised by the Judge of Buncombe County in ordering appellant's arrest, without any reason for so doing, (R. 225, 228, 229), but only to satisfy his own caprice, requires that appellant be dragged back before that tyrant, then God help every person in the United States who has ever been tried and convicted on an indictment. According to appellee, the courts of the asylum state may not consider proof that the alleged fugitive has paid the penalty, or been acquitted, as the courts must confine their scrutiny to the extradition papers alone, when identity is admitted. This court cannot lay down a rule, to be followed by the courts of the United States, upholding such an unconscionable and preposterous contention. Since one who has paid the penalty imposed upon him is no longer subject to the jurisdiction of the court which tried him, obviously, that court is without jurisdiction to demand his return. Jurisdiction in the courts of the demanding state is an essential element for an extradition demand. Appellant in his brief (pp. 33-4-5), shows conclusively that the Buncombe County Court lacks any jurisdiction over him, yet appellee offers not one word in answer to appellant's argument and the citations supporting it, but ignores it. Nowhere in appellee's brief does he answer the many citations of appellant conclusively holding that one, in appellant's position, who has paid in full one of the alternative sentences imposed upon him is no longer subject to the jurisdiction of the court. No-

where does appellee offer one word to controvert citations of appellant which conclusively hold that no one may be twice sentenced on the same indictment and nowhere does appellee answer the many citations of appellant including decisions of the United States Supreme Court, that sentence on one count "definitely and definitively disposes of the entire indictment."

Why does appellee refuse to answer? The reason is clear. There is no answer. Appellee, not having any answer to such sound propositions of law, reiterates in his brief that all matters outside of the requisition papers must be presented to the Buncombe County Court, flying in the face of the fundamental rule that jurisdiction is open to inquiry on Habeas Corpus and that the question of fugitivity is one of *fact* and *not of law*. Appellee evades, and flippantly refuses to discuss, the vital issues of this case; he cites cases, every one of which is inapplicable and wholly foreign to the issues; he assumes false premises such as that "appellant is substantially charged with crime and a fugitive" without offering any proof thereof, other than a second hand indictment, 14 counts of which have been dismissed, ressurrected from the musty files of the Buncombe County Courthouse, for the sole purpose of gratifying the malice of a judge so lacking in conscience and principle as to violate the time honored rule that no judge shall take any part in a case which he has prosecuted; appellee attempts to justify the malodorous action of appellant's former prosecutor by citing to this court cases in which the alleged fugitives had not complied with the sentences imposed upon them and nowhere mentions in his brief the fact that appellant had fully complied with the sentence *imposed* upon him.

CONCLUSION.

Appellee states in his "conclusion" that appellant does a "disservice" to this Honorable Court by calling to this Court's attention the malodorous facts which brought this extradition case to life. The record contains, undenied and

undisputed, the public statement of a congressman (R. 312) that he was going to have appellant's so-called suspended sentence imposed; that shortly thereafter appellant's former prosecutor, now a judge, was, for no apparent reason, shifted (R. 15) from his lawfully assigned court to the court in Buncombe County, where his first act was to order the arrest of appellant and the placing of appellant under $10,000 bond, when appellant's bond at his original trial was only $2,500; the private prosecutors of appellant refusing to divulge the source of their private compensation; the fact that important papers were missing from the Buncombe County files (R. 262); and the illegal attempt on the part of appellant's former prosecutor, now judge, to extend the period of suspension of sentence two days after the term of suspension had expired, all in violation of law.

Appellee asks this Court to shut its eyes to, and disregard, all such matters, without citing one case or rule of law to justify such an unconscionable and outrageous request. Not one word of argument or case in point is offered by appellee to contradict appellant's citations of United States Supreme Court cases and North Carolina Supreme Court cases clearly indicating that appellant is no longer subject to the jurisdiction of the Buncombe County Court. Appellee omits all mention of appellant's having complied with the judgment WHICH WAS IMPOSED UPON HIM and the many cases cited holding that such compliance ends jurisdiction over appellant, all having the same tenor as the following excerpt from the leading case on the subject in the state of North Carolina, *State* v. *Crook*, 115 N. C. 760, 20 S. E. 513:

> "It is familiar judgment that a Court has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count at a subsequent term, super-adding imprisonment."

Appellee asks that this Court, next in importance to the Supreme Court of the United States, lay down a rule that

one who has been tried upon an indictment and complied with the terms and conditions required by the judgment of the court has no alternative but to return to the demanding state. The Court below found that appellant had complied with all the terms of judgment imposed (R. 173, 209) yet that he was still a fugitive, despite the fact that no paper is offered to justify extradition other than the second-hand indictment which has already served its purpose by bringing appellant to trial. The Supreme Court of the United States in commenting upon the power of a court to sentence twice upon the same indictment said:

> "We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."
>
> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common

law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged.''

Ex Parte Lange, 18 Wallace, 163.

In view of the foregoing, and the assignments of error relied upon by appellant in his brief heretofore filed in this Court, the action of the lower court in discharging the Petition and vacating the Writ should be reversed and appellant released.

Respectfully submitted,

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